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No. 45

In the Supreme Court of the United States

OCTOBER TERM, 1960

FEDERAL POWER COMMISSION, PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND THE CITY OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General,
ALAN S. ROSENTHAL,
ANTHONY L. MONDELLO,
Attorneys,
Department of Justice, Washington 25, D.C.

JOHN C. MASON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
ROBERT L. RUSSELL,
Assistant General Counsel,
DAVID J. BARDIN,
Attorney,
Federal Power Commission, Washington 25, D.C.

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OPINIONS BELOW

The orders of the Federal Power Commission denying the certificate application (R. 174a–183a) and denying rehearing (R. 184a–194a) are reported at 21 F.P.C. 138 and 399. The opinion of the Court of Appeals (R. 308–324) is reported at 271 F. 2d 942.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1959 (R. 325). By order of Mr. Justice Brennan dated January 27, 1960, the time within which to file a petition for a writ of certiorari was extended to March 1, 1960. The petition for a

writ of certiorari was filed on February 29, 1960, and granted on April 18, 1960. 362 U.S. 948. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

A New York electric, gas, and steam utility contracted to buy natural gas in the field in Texas for consumption under its own boilers in New York. Federal Power Commission approval of such transactions would not be required since no sale for resale is involved. The New York company arranged for transportation of the gas from the places of purchase in Texas to the point of consumption in New York. The transporting pipeline company then applied to the Federal Power Commission for a certificate of convenience and necessity, under Section 7 of the Natural Gas Act (15 U.S.C. 717f). In denying the certificate, among other things, the Commission considered the effect of this and future similar transactions on the price and availability of natural gas generally; also, the desirability of the particular end-use to which this gas would be put. The questions presented are:

1. Whether, under the public convenience and necessity standard of Section 7, the Commission has the power to evaluate the end-use to which the respondent industrial consumer would put the gas transported by the respondent natural gas company.

2. Whether, taking into account all of the factors considered by the Commission, its decision denying

issuance of the transportation certificate was a reasonable exercise of its judgment which should not have been disturbed by the Court of Appeals.

3. Whether the Court of Appeals erred in remanding the case to the Commission "with directions to issue the certificate applied for".

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, are set forth in the Appendix, *infra*, pp. 87–89.

STATEMENT

1. In a certificate proceeding brought under Section 7 of the Natural Gas Act, Transcontinental Gas Pipe Line Corporation (Transco) sought from the Federal Power Commission a certificate of public convenience and necessity to transport in interstate commerce, for Consolidated Edison Company of New York, Inc. (Con Edison), natural gas which Con Edison had contracted to buy from producers in Texas. Because Transco proposed to perform the transportation under a specially tailored "X–20" rate schedule applicable to Con Edison alone, the arrangement has come to be known as the "X–20 service."

Con Edison had contracted to buy natural gas at 19¼ cents per Mcf in the Normanna and Sejita fields, in southern Texas, for use as boiler fuel at its Waterside steam-electric station in New York City.[1] The gas-purchase contracts prohibit resale of the gas by

[1] The gas would thus be carried from one extremity of Transco's pipeline to the other. See Transco's system map, R. 117a.

Con Edison,[2] and therefore no Commission approval of the sales or purchases is required by the Natural Gas Act. Con Edison then arranged with Transco for transportation of the gas at a rate of 50,000 Mcf[3] daily to New York City.[4]

To the Commission Transco proposed the service to Con Edison as part of its application in F.P.C. Docket No. G–13590, which together with three other dockets[5] represents a major expansion of pipeline and

[2] Con Edison's Vice President testified that it acquiesced in the producers' insistence that the gas not be for resale because it wanted a firm supply, which could not be assured for boiler-fuel use if purchased from Transco under Transco's regular tariff (R. 30a). The tariff provision in question is paragraph 2(b) of Rate Schedule CD–3, under which Con Edison buys gas from Transco, and which permits curtailment of deliveries destined for use as boiler fuel when the gas is needed for use in Transco's underground storage facilities (R. 154a–155a). The X–20 arrangement is so framed that no equivalent tariff limitation would apply to any of the gas, or to facilities for its transportation. See *infra*, p. 85, note 80.

[3] An "Mcf" is one thousand cubic feet. The figures in this Statement are rounded out to close approximations.

[4] The proponents testified that they planned shortly to increase X–20 transportation to 120,000 Mcf per day. Transco also undertook to sell from its own reserves, at Con Edison's option, and without restriction as to resale, up to 50,000 Mcf per day on up-to-60 days of the year, backing off the transportation service to obtain pipeline capacity to deliver its own gas. Con Edison presented testimony that it would exercise that option only in part, and that it planned to burn as boiler fuel, on every day of the year, at least 25,000 Mcf of the gas it had purchased in the field (R. 7a, 29a, 98a). Although under the X–20 arrangement Con Edison would have the right to buy up to 3,000,000 Mcf a year from Transco for resale, the estimate presented to the Commission by Transco was for actual purchases of only 912,500 Mcf (R. 123a, line 10).

[5] G–13143, G–13745, G–13793.

storage facilities. In this Docket No. G–13590, Transco proposed to increase its pipeline system peak-day capacity by some 200,000 Mcf at an investment of $137,000,000 in new facilities.[6] Of this capacity, 50,000 Mcf a day represents capacity for the service to Con Edison under the new "X–20" rate schedule.

2. At the certificate hearing,[7] Con Edison undertook to show that its proposed use of the gas was in the public interest as the only effective and economical means of reducing air pollution in the vicinity of its Waterside station, which is located near the United Nations building in New York City. No showing was made that other fuels were in short supply in New York City, nor that any large price differential existed between gas and coal. Neither did Transco show any significant advantage to its load factor (*i.e.*, the ratio of actual annual flow to designed annual capacity), because it is high in any event, and because the

[6] To appreciate the magnitude of the expansion proposed in G–13590, we may compare it with the 958,000 Mcf which is the total of all previous Transco peak-day allocations (including those in earlier dockets, which were pending at the time of the G–13590 application); unallocated pipeline peak-day capacity would be minimal. Transco's original capacity, as certificated in 1948 before construction of the pipeline, was 340,000 Mcf per day. 7 FPC 24.

[7] The Commission permitted intervention by Con Edison and the City of New York (which supported Transco's application), by the "coal interests" (National Coal Association, United Mine Workers of America, and Fuels Research Council, Inc., which opposed the application), and by the New York Public Service Commission (which remained mute as to the X–20 proposal), among others.

X–20 service does nothing to fill seasonal valleys in the use of its system capacity.* Transco sought instead to show a positive public need arising from the benefit to be achieved by reduction of air pollution.

The record shows that Con Edison's Waterside plant daily emits large quantities of smoke containing flyash, unburned carbon, and sulphur dioxide. Citizens have complained about flyash they attribute to Waterside. But the record fails to relate the part Waterside plays in the total air pollution problem of New York City, Manhattan, mid-Manhattan, or even the vicinity close by Waterside. The Waterside plant is located in Manhattan's eastside, on the west bank of the East River. New York City's air pollution expert, Dr. Leonard Greenburg, then Commissioner of Air Pollution Control, testified that the prevailing winds are from the west (R. 51a; see photographs and map, R. 133a, 134a, 146a). The only testimony of personal or property damage resulting from the Waterside smoke is his expert opinion that as a medical matter such effluents are detrimental to health (R. 111a) and that there was precipitation in the neighborhood due to Waterside (R. 115a). Dr. Greenburg offered neither figures nor studies as to actual damage caused by Waterside (R. 110a–113a), and couched his discussion of the health, as contrasted

*From Transco's Exhibit 7, page 1 (R. 118a), there can be compiled the system's delivery requirements for the year November 1958 through October 1959 as a percentage of the system's capacity for the same period. With the X–20 service the figure is 98.948%; without X–20 the result is 98.900%. The reason X–20 fails to contribute to raising the system load factor is that the boiler-fuel portion may be interrupted in favor of the "60-day consumer gas" only at Con Edison's option.

with the nuisance, implications of such emissions with the caution that "there is a lot we still have to learn", "the health implications * * * is something to be regarded with suspicion" (R. 48a). However, Dr. Greenburg did assert that there appeared to be "no other practical solution" than to convert two of the older boilers at Waterside to natural gas (R. 50a).

There was testimony that aggravated smoke conditions at Waterside are due primarily to performance difficulties with those two older boilers, and perhaps with their dust collectors as well (R. 75a–77a, 78a–81a). There was no detailed evidence comparing the costliness of various alternative means of abating the pollution problem at Waterside. Replacement of the two boilers would be expensive, time consuming, and would require advance planning to shift system load. Con Edison's Vice President Manz concluded that this remedy would be impractical (R. 16a; cf. 81a–84a). Raising one of the smoke stacks would probably ameliorate the smoke conditions, but might require municipal consent (R. 87a–88a). Also, coal at Waterside costs slightly more than gas (R. 102a–103a).*

The record does not show a clear violation of New York City's air pollution ordinance; there was testimony of occasional failure to meet the vaguer "nuisance" standards (compare R. 93a–97a, 108a–109a, 113a–115a). Con Edison has long been concerned with the Waterside smoke emissions, but has developed no plans to shift the load to other locations

* But see Con Edison's Brief in Opposition, p. 6, as to the changed situation since the record was made.

(R. 107a). It burns large volumes of gas on an interruptible basis at other plants, but has not utilized that gas to alleviate, during at least the warmer portion of the year, the supposedly unique situation at Waterside (R. 89a–92a).[10]

3. The hearing examiner regarded the evidence concerning pollution as most speculative, and found that the proponents had not sustained their burden (R. 171a, 172a). Weighing the public interest in consuming gas for superior uses against respondents' claim that this particular boiler fuel use was, in fact, "superior", he found that the applicant had failed to demonstrate that the public convenience and necessity required the transportation service, and therefore, that on this basis the certificate should be denied. The examiner did note that the peaking service portion of X–20[11] "does have very demonstrable and real benefits for Consolidated Edison's gas customers * * *. However, these benefits are obtainable in other ways than by this arrangement and these benefits should not be regarded as being a special attraction" (R. 173a). Finally, however, the examiner held that the Commission had no legal basis for inquiry into the merits of the proposed end-use and approved the requested transportation service (R. 171a).

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[10] Since the hearing, Con Edison's most recent annual report to the Commission indicates that it has moved in that direction; in 1959, without any X–20 arrangement, it managed to burn 10,437,005 Mcf at Waterside (F.P.C. Form No. 1, p. 86–1). Thus, the particular situation at Waterside today provides less support for respondents' certificate application.

[11] *Supra*, p. 4, note 4.

4. The Commission noted the attractiveness of the idea of ameliorating the unpleasant air pollution both around the United Nations building, and generally in New York City (R. 178a, 191a–192a). It concluded, nevertheless, as had the examiner, that the air pollution showing was inadequate to outweigh the social and economic waste of burning natural gas as boiler fuel. It found, too, that weightier considerations compelled the denial of the grant, and in denying rehearing it pointed to various possible adverse effects of the proposal, including (R. 185a, 189a):

> the effect of stimulating increased purchases of gas in the field by distributing companies in substitution for the present, prevalent types of interstate natural-gas service involving purchases and resales by natural-gas pipeline companies; the effect of pre-empting pipeline capacity which would otherwise be available for more widely beneficial public service; the effect of making it more difficult to meet the requirements of smaller purchasers in the event arrangements of this type become wide-spread; and the effect of increasing the rates for gas, to the detriment of the consumer. We also considered the proposed inferior end use of the gas. * * *
>
> * * * * *
>
> Contrary to applicants' contentions, we do not view the proposed end use of the gas involved in this case as of decisive importance. In accordance with the *National Coal Ass'n* case, it is but one factor, and that not of determinative importance, which we consider in the exercise of our judgment on all the facts.

Weighing the adverse factors against the desirability of alleviating air pollution, and other conventional elements which favored granting the application, the Commission found the proposal not in the public interest, and denied the application.

5. The Court of Appeals set aside the Commission's order denying Transco's application, on the basis that the Commission had exceeded its jurisdiction by considering the end-use to which the gas would be put. It read in the Commission's "examination and disapproval of the end use to be made of this gas", an assertion of "a general allocation and conservation authority over the natural gas fields of the United States" (R. 312). It found from its examination of legislative materials that the Commission had requested such general conservation authority from Congress and was not granted it in the Natural Gas Act or its amendments. The court commented directly on each of the critical policy considerations which persuaded the Commission, on balance with other factors, to deny the application. It found two of these considerations—*i.e.*, preemption of capacity, and effect on prices—to be implicit assertions of general conservation authority. Without characterizing the Commission's consideration of the small gas consumer's inability to bid competitively with large purchasers in the gas fields, the court found this also to be a consideration "which the Congress did not envisage" (R. 323).

The court directed that the Commission grant the certificate, permitting it first to conduct hearings on only one minor, disputed, factual matter.

SUMMARY OF ARGUMENT

I

The threat posed by the X–20 type of arrangement to the small consumer, the person for whom the protections of the Natural Gas Act were designed, lies in its potential to establish a new, unregulated, interstate market for natural gas—by the large industrial consumer purchasing directly from the producer—which will compete for new gas supplies with the regulated market over which the Commission currently exercises jurisdiction. This unregulated alternative to selling gas in the rate-controlled interstate market is most attractive to producers and to large industrial consumers alike, and has the potential for absorbing a dangerously large proportion of new gas reserves as they become available in the future.

Since the X–20 arrangement involves a direct interstate purchase of gas for its own boiler-fuel use by a large industrial consumer from producers in the field, the transaction is not within the Commission's jurisdiction over sales of gas for resale by a natural gas company. But the interstate *transportation* of gas so purchased is within Commission jurisdiction under Section 1(b) of the Act, and such transportation is not permissible unless the Commission finds it to be in the public interest, and issues therefor, under Section 7 of the Act, a certificate of public convenience and necessity.

In the Commission's view, the new market which this and further X–20 transactions would establish (1) portends definite and lasting inflationary impact on gas

prices generally, (2) would probably be devoted to end-uses inappropriate to the Act's purposes, (3) would disrupt patterns of industry growth carefully evolved during 20 years of congressionally-directed regulation, and (4) would be beyond effective state regulation.

On the basis of its judgment that these damaging probable effects outweighed both (1) Con Edison's need for the gas, and (2) the inadequately shown contribution which burning the gas as boiler fuel might make to local air pollution control, the Commission denied Transco's application for a certificate as not being required by the present or future public convenience and necessity. The court of appeals ruled, however, that Congress, in the Natural Gas Act, had precluded the Commission from taking such matters into account in determining, under the standard of "public convenience and necessity", whether a transportation certificate should issue.

We show in Point II, from the legislative history of the Act, that Congress clearly empowered the Commission to consider end-use, price impact, preemption of gas and pipeline capacity, and comparable factors. We then show in Point III that the accepted interpretation of the present or future public convenience and necessity standard likewise permits and requires Commission consideration of such factors which affect the public interest. In Point IV we explain why the Commission's appraisal in this case of the various relevant factors it considered is a reasonable and appropriate evaluation and should not be overturned; we conclude by pointing out in Point V that, in any event, the court of ap-

peals should not have ordered the Commission to issue the certificate, but should have remanded the case for further exercise of the Commission's own judgment in the light of the court's opinion and changed circumstances.

II

The legislative history of the Natural Gas Act shows clearly that Congress, in its grant of certificate authority to the Commission, entrusted it to consider all relevant factors which might have a bearing on the public convenience and necessity—including the end-use of the gas, conservation, price impact of a transaction, etc. The 1936 report of the Federal Trade Commission on the natural gas industry, noted in Section 1(a) of the Act as a main source of its policy, recognized that, in view of the exhaustability of the precious natural gas reserve, the burning of natural gas for boiler fuel is an inferior use compared to its use for cooking, and hot water and space heating by householders and other small consumers. Stressing the need for conservation of the resource in terms of avoidance of inferior uses, the Trade Commission suggested a public agency which could weigh private rights and equities together with the general public interest. In the original 1938 Act, Congress provided a general certificate authority to protect the gas consumer's interest in adequate service at reasonable rates, but limited it to the construction of facilities which would transport gas to a market in which natural gas was already being served by a natural gas company. Since the limitation proved unworkable, the

Commission sought amendment of Section 7 of the Act to broaden the certificate authority to cover *all* constructions and extensions of service. The explicit purpose of the amendment was to give the Commission "complete regulatory control" over transportation, and over the evaluation of the interests of competing fuels and competing methods of transportation. The hearings (on the bill which constitutes the 1942 amendment to Section 7 of the Act) contain (1) abundant reference to the broad inquiry permitted the Commission in certificate cases, (2) unchallenged assertions by a Commissioner of the Federal Power Commission of the breadth and scope of Commission power in such cases, (3) the Committee's rejection of a suggestion that the certificate power be curtailed by a specific enumeration of permissible areas of inquiry, and (4) the stated lack of opposition to the bill by the industry. In our view, the Committee Reports on the bill coincide with the Commission's understanding of its breadth.

In dealing with this legislative history in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 468–469, and *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 612, 616–617, this Court confirmed that it demonstrates the Commission's present power, *in certificate cases*, to consider the end-use and conservation aspects of the problems with which it is concerned.

There is no indication in the legislative history that Congress had any design to limit the Commission's range of inquiry in its application of the standard of public convenience and necessity. On the contrary,

this history shows that the Commission is empowered broadly to promote the development of the industry along lines which would be consistent with the public interest, and without undue disturbance of existing operating arrangements of natural gas companies.

III

A. In addition to the particular history of the Natural Gas Act, the Commission's view of the breadth of its permissible inquiry is supported by the accepted function and meaning of the standard of public convenience and necessity in federal public utility regulation. This Court has held that use of the standard in the Natural Gas Act, as well as in other legislation establishing federal regulatory commissions, authorizes the expert body chosen by Congress to determine, from its analysis of the "total situation", on which side of a controversy the public interest lies. The Court recently cautioned that, in performing this certificate function, the Power Commission must consider *all* factors bearing on the problem before it (*Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 391).

B. In particular, it is clear under the Natural Gas Act and under comparable legislation that such consideration can and must include relevant factors which the regulatory commission cannot directly regulate. Such elements are *not* excluded in deciding where the public interest lies in the particular transaction which the Commission can regulate.

C. Regulatory agencies are similarly required to

consider important congressional policies which permeate other legislation, such as national defense or antitrust policies. And whatever the area of consideration, the Commission is not restricted to the narrow transaction immediately before it, but may appropriately take account of a wide range of factors bearing upon its obligation to protect the general public interest.

IV

The discretion exercised by the Commission in this case—its weighing of the factors of end-use, price impact, preemption of gas supply and pipeline capacity, the "conventional requirements", and the record made on air pollution control—is reasonable and is warranted by the particular record before it, its own general expert judgment, and the overriding concern of the Natural Gas Act with the protection of the small consumer. This reasonable and appropriate judgment should not be overturned.

A. *End-use.* The Act's requirement that the Commission consider the interests of competing fuels necessarily involves an ultimate judgment as to which of two or more fuels shall be used. Consideration of such use is necessary and responsive to the unusually explicit Congressional direction in the legislative history that the roles of competing fuels be assayed. Application to the facts of this record of the Commission's flexible boiler-fuel policy—its rebuttable presumption that the use of gas as boiler fuel is inferior usage and should be permitted only on a positive showing that the public interest requires it—is wholly reasonable.

B. *Price impact and preemption of gas supply and pipeline capacity.* The most damaging impact of the X–20 type of direct industrial sale will fall upon the general public utility consumer, for whose protection the Natural Gas Act was principally designed. The Commission's judgment that the presence of additional bidders in the gas fields will drive up the price of gas is supported by the demonstrated attractiveness to producers of an unregulated market and the attractiveness to large industrial consumers of a firm (not interruptible) gas supply. Past transactions, current negotiations which await the outcome of this litigation, testimony in other proceedings, and the predictions of the trade journals, all combine to support the accuracy of the Commission's judgment that the vastness of the potential direct industrial sale market will probably have an unduly inflationary impact on gas prices. Protection of the smaller consumer depends on the extent to which new gas reserves are dedicated to interstate sales under regulated prices. If the unregulated market broadly expands, as permitted by the X–20 type of arrangement, the dual effect of diversion of new gas and uncontrolled prices will probably mean for the consumer that he will have less adequate service at higher prices.

Moreover, gas consumed as boiler fuel is preempted from any possible use for more beneficial public needs, such as immediate more desirable use, or temporary storage for such ultimate use. Similarly, the limited capacity of a pipeline to expand beneficially is preempted by the dedication of a portion of its unused capacity to less desirable transportation. Private in-

centives may well encourage expansion of the unregulated market, and abandonment of the industry patterns (i.e., resale to the ultimate consumer after pipeline transportation and sale) which currently protect the public utility consumer because of the Commission's power over the pipeline's sale to the local distributing company or to the industrial purchaser.

C. *Air pollution.* The record made by respondents on the effect of Waterside's addition to New York City's air pollution control problem left much to be desired. No adequate study was presented of the sources near Waterside, or elsewhere in the city, of gaseous and particulate contaminants emitted into the atmosphere. No discriminating analysis was made of the source of the contaminants of either sort which grounded the complaints of the local citizens. Inadequate account was taken of the effect on the pollution problem of prevailing winds and the proximity of the East River on the leeward side of the Waterside station. Also lacking in significant detail is the testimony regarding the cost of various pollution abatement alternatives available to Con Edison. No actual health or property damage attributable to Waterside emissions was shown. On this record, the examiner's finding of record inadequacy, and the Commission's determination that the showing fell short of outweighing competing public interest factors, is certainly both reasonable and well supported.

In sum, the Commission's conclusion, reached after weighing all of these factors in the public interest, is a reasonable judgment which Congress entrusted to the Commission, and which should be respected by the courts.

V

Assuming that the court of appeals' ruling on the legal question of Commission power was correct, it should still, under established principles, have remanded the case to the Commission for reconsideration in light of the court's ruling. Additionally, special reasons exist in this case for following this normal course.

A. In proceedings subsequent to its denial of Transco's application, the Commission authorized Transco to build and dedicate to other purposes some of the facilities which its former application proposed for X–20 use. The former application is now out of date, and literal compliance with the court of appeals' direction to "issue the certificate applied for" would not enable performance of the X–20 service. Present circumstances would require a different or amended application to be determined on the basis of the facts as they now are.

B. Similarly, the court of appeals' direction that the Commission issue a certificate denies it the opportunity to impose regulatory conditions on transportation of the X–20 gas, which it had not needed to consider because it had wholly denied the certificate. Unrestricted remand to the Commission would enable it to protect the public interest in transportation of the X–20 gas.

C. The availability of gas for boiler fuel use to Con Edison through ordinary purchases from Transco (it burned over 10,000,000 Mcf at Waterside in 1959, without the X–20 service) is an additional question that could be resolved on remand.

ARGUMENT

I

INTRODUCTION—THE PROBLEM OF DIRECT INTERSTATE PURCHASES OF NATURAL GAS BY LARGE INDUSTRIAL CONSUMERS

This case involves the range of Federal Power Commission inquiry, under its statutory power to regulate the transportation of natural gas,[12] in an area where the denial of Commission power gravely impedes effective regulation of the industry. Because Con Edison's purchase and industrial use of the Texas gas are not in themselves regulable by the Commission, the Court of Appeals has held the Commission barred from considering that use in passing upon

[12] Section 1(b) of the Natural Gas Act gives the Federal Power Commission jurisdiction over the "transportation of natural gas in interstate commerce." 15 U.S.C. 717(b). Natural gas companies (Transco, here) may transport natural gas in their pipelines only as authorized by "a certificate of public convenience and necessity" issued, after hearings, by the Commission. 15 U.S.C. 717f(c). The certificate, authorizing all or part of an application, is issued to any qualified applicant,

"* * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *".

The Commission is also given the

"* * * power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

Transco's application to transport the gas. If this interpretation of the Natural Gas Act is permitted to stand, there will, in all probability, arise a new, unregulated, interstate market for natural gas—so vast in potential that it could absorb a dangerously large portion of the new gas reserves which become available in the United States. The Commission is of the view that this new market—by industrial enterprises purchasing interstate for their own use—which would compete for gas supplies with the regulated market over which the Commission currently exercises jurisdiction, (1) portends definite and lasting inflationary impact on gas prices generally, (2) could, and probably would, be devoted to end-uses inappropriate to the purposes of the Act, (3) would disrupt patterns of industry growth carefully evolved during 20 years of congressionally-directed regulation, and (4) would be beyond effective state regulation.

If the Court of Appeals is correct, under the direct sale-transportation arrangement proposed in the X-20 service here, only the bare transportation of the gas would be subject to regulation—the purchase, sale, and use of the gas concededly being wholly outside the rate-setting and other powers of the Commission. The incentives for gas producers and industrial consumers to make such arrangements are strong and obvious. Producers could sell at uncontrolled prices to out-of-state purchasers.[13] By virtue

[13] We recognize, of course, that producers today make wholly intrastate sales at uncontrolled prices. But the intrastate market is relatively stable and does not threaten suddenly to

of the very decisions of this Court which prompted passage of the Natural Gas Act in the first place, there is some question whether the producing states would have power effectively to control rates for and uses of such interstate sales.[14] In any event, there is no incentive for a producing state to regulate such prices. The purchasers could use the gas as boiler-fuel, without hindrance or federal supervision. And as an added spur to such arrangements, the producers and the industrial purchasers could count on the Commission to underwrite low transportation rates for such gas in effectuating the statutory objectives of its jurisdiction over transportation.

In view of the natural gas industry's post-World War II history of dynamic expansion, coupled with

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grow by leaps and bounds. Furthermore, congressional exemption of exclusively intrastate arrangements (*i.e.*, ones not dependent on interstate facilities) from the coverage of the Act can fairly be read as giving a deliberate advantage to the local economy in the use of a local sub-soil resource. (Thus Texas may, and does, further local industrialization by leaving intrastate sales unregulated, which gives local buyers a bargaining advantage in dealing with producers. Cf. F.P.C., *Natural Gas Investigation*, Olds-Draper Report, pp. 33–49, 61–74. Producing states, however, lack direct power to retain their gas within their borders. *Pennsylvania* v. *West Virginia*, 262 U.S. 553.) Today, prices in the smaller intrastate market often follow the regulated interstate prices.

[14] *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83; see *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682–683; but see *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 187–188; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329; compare *Natural Gas Pipeline Company* v. *Panoma Corporation*, 349 U.S. 44; *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 355 U.S. 391.

ever-increasing demand in large, and still unsatisfied, geographic areas of the country, it seems certain that this type of arrangement will prove attractive and will give rise to vigorous competitive bidding in the fields for gas to supply these demands. Uncontrolled price negotiations—gas to the highest bidder—will determine, in large measure, whether gas will continue to serve the firm needs of its millions of existing consumers, or will instead be diverted to the inferior uses like industrial boiler-firing. And if the Commission has no control over this type of service, under its transportation jurisdiction, new construction and extension of existing pipelines may well concentrate on essentially industrial service.[15]

The answer of the Third Circuit to this problem is simply that, even though the Commission may be right in its appraisal of the potentially injurious effects of unregulated transactions of this type, Congress has precluded it, in the Natural Gas Act, from taking account of these consequences in determining whether a pipeline should be permitted, under the standard of public convenience and necessity, to carry in interstate commerce the gas sold directly for such industrial use. On the other hand, we believe that the Congress whose purpose it was "to create a comprehensive and effective regulatory scheme" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission,* 332 U.S. 507, 520) did not so disable

[15] We discuss in more detail, *infra*, pp. 58*ff*., the adverse impact on the smaller consumers of direct sales to large industrial consumers, in connection with our argument that the Commission's evaluation of the various factors properly relevant to Transco's application was entirely reasonable.

the Commission. We shall show, first, that the Commission can and must consider end-use, price impact, preemption of supply and pipeline capacity, and other factors bearing on service to smaller consumers when it is called upon to apply the "present or future public convenience and necessity" criterion of Section 7 to a pipeline's application to transport gas to large industrial consumers. Second, we shall explain why the Commission's appraisal in this case of these relevant factors was reasonable and should not be overturned. Finally, we shall point out that, in any event, the court below should not have ordered the Commission to issue a certificate to Transco but should have done no more than remand for the further exercise of the Commission's own judgment.

II

THE LEGISLATIVE HISTORY OF THE NATURAL GAS ACT DEMONSTRATES THAT THE COMMISSION IS EMPOWERED, IN PASSING UPON APPLICATIONS TO TRANSPORT GAS, TO CONSIDER THE END-USE OF THE GAS, THE PRICE IMPACT OF THE TRANSACTION, THE EFFECT ON SUPPLY, AND COMPARABLE FACTORS

The Court of Appeals reversed the Commission's order because it felt that the Commission had improperly taken account, with respect to Transco's application for authority to transport Con Edison's gas, of factors excluded by Congress from the confines of the public convenience and necessity standard of Section 7; and the court's view of the limits of that standard rested primarily, if not exclusively, on its reading the legislative history of that section. The opinion sees the history of the 1942 amendments to

Section 7, and especially certain subsequent Commission statements, as precluding a Congressional purpose to grant "conservation" power over natural gas. It then concludes that the various factors considered by the Commission, here—*i.e.*, price impact, availability of gas supply, preemption of transportation facilities, and end-use—are all evidence of assertion by the Commission of "a general allocation and conservation authority over the natural gas fields of the United States" (R. 312, 321–323). We shall show, however, that while the Commission does not have, and has never claimed, such sweeping powers as the court's language suggests, the legislative history does support the Commission's position that it can and must consider these various factors, which involve the effect of the industrial transaction on non-industrial and smaller consumers, when it applies the "present or future public convenience and necessity" standard of Section 7 to a pipeline's application for authority to carry the industrial gas.

A. *The legislative history.*—The Federal Trade Commission investigation, which is specifically singled out in the introductory clause of Section 1(a) of the Natural Gas Act as a source of the policy of the Act, concluded that:

> Conservation is the first problem that demands attention. * * * Such a valuable nonreplaceable natural resource of general country-wide use or need should, in the public interest, be conserved and utilized to the highest economic and social advantage.[16]

[16] Federal Trade Commission, *Final Report to the Senate of the United States*, Sen. Doc. 92, 70th Cong., 1st sess., Part 84–A (1936), p. 608.

The Trade Commission suggested a spectrum of relatively wasteful or beneficial uses. Lowest on the scale is wastage without any beneficial use whatsoever, as when gas produced in conjunction with oil is vented or flared, a practice which was common in the 1930's. Next are minor beneficial uses, such as recovering gasoline from the gas or burning the gas to produce carbon black, which waste the great bulk of the energy stored in the gas. A higher use is firing gas under boilers (as Con Edison would do here) in lieu of coal. The Trade Commission noted that such use was common and reduced business investment and operating expense, but that the coal supply for firing boilers and furnaces seemed ample for many generations. It then commented:

> The gas industry claims that the supply to general consumers at prevailing prices is only made possible by the quantity sales to industry in direct competition with coal and oil. Whether such a situation is essential to maintain service at moderate prices to general consumers is one problem, but it does not eliminate the fact that every thousand feet used to replace coal in large operations has diminished the future supply of *natural gas available for the householder and other retail consumers, which*

The need for effective regulation in light of the exhaustibility of the precious natural gas resource is the most basic fact of the natural gas industry, and one which this Court has amply recognized. See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 606. Limited resources are "precious: they cannot be left to wasteful use without detriment to the public interest." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216.

may be considered the highest grade of service to which natural gas may be put.

* * * * *

When it comes to regulation of the essential waste that occurs in obtaining a partial or low-form recovery of the inherent qualities of the gas, especially in the absence of a sufficient competitive market to absorb all the available gas at prices making it uneconomic to carry on the wasteful processes, a delicate problem arises. It contrasts individual property rights and realization of immediate income with the ultimate general good. *It should be solved in favor of the public interest before this natural resource is destroyed.*[17] [Emphasis added.]

The Trade Commission did not offer final answers to the end-use problems which its investigation raised, beyond the need for regulation in the national public interest.[18] The Natural Gas Act of 1938, and particu-

[17] Sen. Doc. 92, 70th Cong., 1st sess., Part 84–A, pp. 125–126 (1936) (emphasis added).

[18] Sen. Doc. 92, 70th Cong., 1st sess., Part 84–A, pp. 101–102 (1936):

"The economic necessity for conservation of natural gas lies in the importance of preventing excessive waste of this limited and exhaustible natural resource, the exploitation of which is subject to the effects of selfish and short-sighted operations. The interest of the public consists in conserving gas for those uses for which it is especially adapted, and in conserving the gas energy in the ground as a means of increasing oil production. * * * The economic interests concerned are so numerous and so often in conflict that it is hopeless to expect the formulation or application of an effective plan for preventing waste by these interests unassisted by public authority.

* * * The question of preferential interest in the use of gas involved in what constitutes wastage as distinguished from legal

larly the 1942 amendment, lodged consideration of these questions with the Federal Power Commission.

The original 1938 Act delegated rate-making and a limited certificate authority over natural gas companies to the Federal Power Commission but, until 1942, the Act lacked the universal requirement that companies possess a certificate of public convenience and necessity prior to engaging in interstate transportation or wholesales of gas. The Commission jurisdiction over the proposed construction of facilities was limited to those which would transport gas to a market in which natural gas was already being served by a natural gas company; but within this limit service was to be provided "at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." Section 7(c). 52 Stat.

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use, must be given attention. Closely allied is the subject of competition of natural gas with other fuels, particularly in industry, the extent to which it is practicable and desirable to restrict production and use to public-utility and domestic uses for which natural gas is particularly adapted, but which may furnish demand wholly inadequate to take production, especially in the flush production period of oil fields. The feasibility of restricting use of natural gas to such purposes in the light of the effect of low-load factors attainable for domestic and commercial use on the operating expenses and rates of natural-gas utility companies, if they are denied the privilege of selling gas for industrial uses, must also be taken into consideration. Then, too, there are the interstate and intrastate features of the business and the fact that part of the interests involved are subject to public-utility regulation, while other parts are conducted as unregulated competitive ventures. *As a whole, the question of conservation and prevention of waste of natural gas, therefore, involves an extremely complicated and difficult situation, any satisfactory solution of which requires impartial weighing of private rights and equities and public interest.* * * *" (Emphasis added.)

825; and see *Atlantic Refining Co* v. *Public Service Commission,* 360 U.S. 378, 388, and footnote 7.

By 1942, when the amended Section 7 was enacted, circumstances had changed greatly. The original Act had been passed during a period of economic depression in a relatively static economy, by a Congress preoccupied with the prevention of price abuses in a market in which producer gas was in over-supply, but where the main sellers (the pipelines) held natural monopolies.[19] By 1941 the effects of the defense economy were beginning to be felt, stimulating increased demand for natural gas and a resulting interest in proposed pipeline construction (documented in the legislative history of the 1942 amendments [20]). These amendments, embodying a changed and expanded philosophy of federal gas regulation, were a response to the pressure of these conditions and to dissatisfaction with the existing Section 7(c).

For it was universally recognized by 1941 that the original Section 7(c) was defective. The Commission had found Section 7(c) unworkable and undesirable for two principal reasons: (1) the lack of certificate authority over most pipeline extensions made it much more difficult to regulate the operation of such new extensions once initiated; and (2) the Section 7(c) requirement that the Commission, prior to assuming jurisdiction over a new service, decide the complex economic question of whether the "market" in ques-

[19] See *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

[20] Hearings on H.R. 5249, House Committee on Interstate and Foreign Commerce, 77th Cong., 1st sess., pp. 33–34, 61–63.

tion was "already being served by another natural-gas company" had proved unworkable.[21] The pipelines did not oppose extension of federal certification to all their interstate operations, because the lack of a universally applicable and workable certification procedure made it difficult for them to promote and finance pipeline extensions in order to meet the growing need for gas.[22]

In its 1940 Annual Report to Congress,[23] the Commission underlined its concern with then Section 7(c)'s unworkability, and its consequent inability to control the rapidly expanding industry with a view to conserving one of the country's valuable but exhaustible energy resources. It stated (p. 78):

> It should be noted that the Commission's jurisdiction over proposed new pipe-line construction is limited to those cases in which the new line will enter the market area already being served by another natural-gas company. This limitation has serious disadvantages in terms of the general purposes of the Natural Gas Act. In the first place, as there is no precise definition of the market area of another natural-gas company, the Commission must decide in each instance whether or not it has jurisdiction. *In the second place, it prevents any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving*

[21] Hearings on H.R. 5249, *supra*, at pp. 81-84; F.P.C. Nineteenth Annual Report for fiscal year ended June 30, 1939, p. 21.

[22] Hearings on H.R. 5249, *supra*, at pp. 3, 35.

[23] F.P.C. Twentieth Annual Report for fiscal year ended June 30, 1940, transmitted to Congress under letter dated December 1, 1940.

one of the country's valuable but exhaustible energy resources. [Emphasis added.]

In 1941, the Commission implemented its recommendations by submitting to Congress a draft of an amendment to Section 7 of the Act. In hearings on this bill [24] which led to the 1942 amendment, Commissioner Manly testified to the Commission's view that, because of the limited range of its certificate jurisdiction under the 1938 Act, it should not permit full rights of intervention to coal, labor and railroad interests in its hearings, on the basis that Congress had not intended it to weigh the social and economic interests in competitive fuels and competitive methods of transportation.[25] In recognition of his stress on the unsatisfactory administration of Section 7(c) which contained these limitations, the House report on the amendment stated:

> * * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as

[24] The bill was originally introduced on May 20, 1941 as H.R. 4819, 87 Cong. Rec. 4301, which was revised and resubmitted as H.R. 5249. H.R. 5249 was prepared in cooperation with the National Association of Railroad and Utilities Commissioners as well as other interested groups. Hearings, *supra*, pp. 3, 38, 50. The amendment, insofar as here pertinent, was enacted substantially in the form presented by the Commission. See H. Rept. 1290, 77th Cong., 1st sess., pp. 1-6.

[25] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong. 1st sess., p. 5.

the public interest may demand. Without such authority, the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was asked to finance the enterprise.

The bill, as amended, eliminates the objections to the present Section 7(c) above mentioned. By this legislation * * * *the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation interests.* [H. Rep. 1290, 77th Cong., 1st sess., p. 3; emphasis added.]

The Commission's view that the bill's purpose was to grant it "complete regulatory control" over transportation and evaluation of competing fuel interests was stated in its report to the House on the bill (House of Representative's Committee on Interstate Commerce, Hearings on H.R. 5249, Natural Gas Act Amendments (77th Cong., 1st sess. 1941), p. 82):

> The present provisions of section 7(c) also restrict the Commission unnecessarily in the matter of allowing intervention by parties whose primary concern may be their own economic interests, but whose participation may be in the public interest. The Commission's opinion *In the Matter of Kansas Pipe Line & Gas Company,* Docket No. G–106 [2 F.P.C. 29]; *In the Matter of North Dakota Consumers Gas Company,* Docket No. G–119 [2 F.P.C. 57], holds that, as Congress in section 7(c) gave the Com-

mission jurisdiction "only when the proposed construction is of facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company," "it would appear that Congress did not intend this Commission generally to weigh the broad social and economic effects of the use of various fuels" in passing on applications in certificate cases under the section. The amendment as proposed would remove the obstacle which the language of the existing statute presents to the allowance of intervention by representatives of competing fuel interests.

* * * * *

* * * The proposed bill in all its provisions seems well adapted to accomplish the avowed purpose of vesting in the Federal Power Commission complete regulatory control through the instrumentality of the certificate of public convenience and necessity over the transportation and sale of natural gas and all extensions and new construction of pipe lines and other facilities by natural-gas companies.

And in his detailed testimony, Commissioner Manly emphasized the broad and timely inquiry the amendment would permit the Commission to make, a facet he described as "the most important aspect of the proposed amendment from the standpoint of the public interest".[26] He continued:

It will have the effect, in our opinion, of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility of the proposed serv-

[26] Hearings, *supra*, p. 6.

> ices, and the characteristics of the rate structure at a time when such vital matters can be revised and modified as the public interest demands. Without this authority the Commission is too often confronted with a situation in which it must either accept conditions which appear to be undesirable from the public standpoint or take the alternative course of subsequently requiring changes which may have much more serious consequences than would have been the case if such changes had been effected before the public was invited to invest in the new enterprise.

Thereafter, at the hearings, there developed a line of questioning whether, in certificate cases, the Commission could give consideration to public needs "by broadening or extending the application in such a way as to better serve the public interest," *i.e.*, by requiring the applicant "to render more useful or more general service." Commissioner Manly's response was that he was sure the Commission had done so in all cases, and he gave as an example a case in which the Commission conditioned a certificate by requiring the applicant to serve communities lying along the route of a proposed pipeline, when the application had contained no such service proposal. (Hearings, *supra*, pp. 23–24.)

At this juncture, it was suggested by a member of the Committee that the power to condition certificates should be curtailed, and the Commission's certificate authority should be limited to "conditions affecting rates, services, and things of that nature." Commissioner Manly's reaction was emphatically to the con-

trary. Pointing out that the Commission would have no objection to language which would limit the power to "relevant, material, reasonable terms and conditions," which would be limited in turn by the "requirement that the public interest and necessity should require such conditions," he added:

> I would ask that you do not attempt to specify, because when you specify, you can never anticipate all of the situations that are going to arise. In fact, you usually do not anticipate the ones that customarily arise, and under the rules of construction, if you specify them, you have limited the type of conditions that can be attached. If you make it reasonable, relevant, and material, so that the party has a right to go into court if the Commission attempts to get tyrannical or arbitrary, fine; but when you try to spell out the terms and conditions, you do make it awfully hard to administer.

Significantly, the Committee followed Commissioner Manly's urging. In preparing the final form of the amended Section 7, it decided not to limit the substantive range of Commission concerns in conditioning service authorizations.[27]

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[27] Instead, the Committee merely assured the possibility of judicial review by inserting the word "reasonable" and deleting the phrase "in its judgment", as follows: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such *reasonable* terms and conditions as ~~in its judgment~~ the public convenience and necessity may require." H.R. 5249, 77th Cong., 1st sess., as reported with amendments October 21, 1941. Union Calendar No. 457, p. 4, lines 2–5.

As we have already indicated, the Committee reports on H.R. 5249 bear out the broad range of inquiry permitted the Commission by the 1942 amendments to Section 7. The House report (H. Rept. 1290, 77th Cong., 1st Sess., pp. 2–3) states:

> The bill, as amended, eliminates the objections to the present section 7(c) above mentioned. By this legislation, the present jurisdictional disputes are eliminated, and the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation interests. This result is accomplished, moreover, without undue disturbance of existing operating arrangements of natural-gas companies.

Similarly, the Senate report on the bill (S. Rept. 948, 77th Cong., 2d sess., pp. 1–2) states:

> Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to "a market in which natural gas is already being served by another natural-gas company." Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied. Obviously these are powers that Federal Power Commission should have and should exercise in the public interest.

In sum, the original Act expressly provided consumer protection in terms of reasonable rates and

adequate service in areas already served by natural gas companies. The 1942 Act was not designed to retreat from this protection. The complaint against the original statute was that the protection afforded did not apply to *all* new services and was therefore inadequate to control either uneconomic expansion or the competition between fuels. Hearings on H.R. 5249, House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., pp. 5, 8, 9, 11–12, 81–84. While the industry might have preferred that any inhibitions or expansions in development should be left "more to the economic nature of the matter than to the * * * ruling of the Commission", the bill was not opposed by the industry (Hearings, *supra*, p. 35). It was clear that the 1938 Act left the unserved area of the United States "wide open for natural-gas companies to exploit or develop in any way that they choose and without regard to * * * public interest" requirements, and that the new bill would give the Commission control over such development (Hearings, *supra*, pp. 12, 35). It is in this light that Congress accepted the Commission's Annual Report for fiscal year 1940 which stated (p. 78), in recommending amendment of the then existing Section 7, that the incomplete coverage of that Section "prevents any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources."[28] And this Court has

[28] It should be noted that this statement is in the Section of the Commission's Report dealing solely with the proposed amendment to Section 7(c) of the Natural Gas Act, and does

confirmed the close relationship of the Commission's 1940 report to the 1942 amendments—in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 468–469, *infra*, a case overlooked by the court of appeals.

In *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, the Court refused to require the Commission to effect end-use conservation objectives in exercising its jurisdiction under Sections 4(a) and 5(a) to regulate *rates*.[29] But with respect to *certificate* cases, the Court stated (*Id.* at 612):

> * * * [W]e may assume that, apart from the express exemptions contained in § 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity. * * *

The Court also said (*Id.* at 616–617):

> * * * The Act of February 7, 1942, by broadening § 7 gave the Commission some additional authority to deal with the conservation aspects of the problem.[30] * * *

[30] The Commission has been alert to the problems of conservation in its administration of the Act. It has indeed suggested that it might be wise to restrict the use of natural gas "by functions rather than by areas." Annual Report (1940) p. 79.

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not relate to the Commission's entirely independent recommendation in the report (pp. 79–80) that it be given broad conservation authority permitting it to allocate the consumption of natural gas on a country-wide basis.

[29] Justices Frankfurter and Jackson dissented. They would have read the "just and reasonable" rate standard as embracing conservation considerations. 320 U.S. at 624, 628. Cf. *Transcontinental Gas Pipe Line Corp.*, 9 F.P.C. 32, 50.

> The Commission stated in that connection that natural gas was particularly adapted to certain industrial uses. But it added that *the general use of such gas "under boilers for the production of steam" is "under most circumstances of very questionable social economy." Ibid.* [Emphasis added.]

And speaking of the extension of certificate jurisdiction in the 1942 amendment, the Court said (*Id.* at 613, footnote 23):

> Considerations of conservation entered into the proposal to give the Act that broader scope.

Subsequently, in *Federal Power Commission* v. *East Ohio Gas Company*, 338 U.S. 464, 468–469, the Court confirmed its interpretation of the 1942 amendment:

> Moreover, the initial interest of Congress in regulation of transportation facilities was re-emphasized in 1942 by passage of an amendment to § 7(*c*) of the Act broadening the Commission's powers over the construction or extension of pipe lines. 56 Stat. 83. This amendment followed a report of the Commission to Congress pointing out that without amendment the Act vested the Commission with inadequate power to make "any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources." [The Court's footnote is omitted.]

[30] The Court discussed the 1940 Annual Report and the 1942 amendments in support of its holding that the Commission has independent jurisdiction over "transportation" even apart from a jurisdictional "sale." That holding explains the basis for Transco's application in this case. And Congress effec-

B. *Significance of the legislative history.*—1. This legislative history does not support the argument that the Act, as amended in 1942, prohibits the Commission from inquiring into end-use, price-impact, preemption of facilities, availability of gas supplies, or any other factors bearing on the adequacy of service to existing or potential consumers. On the contrary, the legislative background reflects neither a niggardly delegation of power, nor an invitation to cramping construction. Congress was clearly made aware that the Commission would use its certificate power—under the broad rubric of "present or future public convenience and necessity"—to take account of conservation factors, comparative end-uses, competing fuels, and the congeries of other elements affecting the pub-

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tively ratified the Court's analysis of the statute when, in enacting Section 1(c), 68 Stat. 36 (1954), 15 U.S.C. 717(c), it deliberately overruled only the particular result in *East Ohio*, but not its basic rationale, by exempting only a part of such transportation, as the text of that Section shows:

"(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction."

lic interest. No artificial limits were suggested for the range of relevance. There is no reason to believe that Congress wished to depart in any way from the accepted breadth of the concept of "public convenience and necessity" (see *infra*, pp. 45–55).[31]

In addition, Congress was aware of the developed patterns and arrangements of the industry, and, as the House report notes, the full scale of considerations permitted the Commission would be effected "without undue disturbance of existing operating arrangements of natural-gas companies" (*supra*, p. 36). Included in such operating arrangements is industrial consumption on an interruptible basis, as a device for increasing the "load factor" in pipeline facilities.[32] Such consumption in warm periods, when the demands of smaller domestic and commercial consumers are reduced, permits optimum year-round use of pipeline facilities, thereby making it possible to provide gas service to domestic consumers who would not other-

[31] It should be explicitly noted that Congress was dealing with a precious natural resource, and that the certificate mechanism is often used as a device to help prevent the squandering of such a limited resource. Compare the licensing requirement in the Federal Power Act, 16 U.S.C. 797, which limits the number of developers and the aims of development for the nation's limited water resources, with the willingness of Congress to subject merely to rate regulation however many electric utility companies wish to transmit or sell electric power in interstate commerce. 16 U.S.C. 824.

[32] This pattern was noted in the basic Federal Trade Commission report, *supra*, pp. 27–28, note 18; and is discussed in the Brief *Amicus Curiae* of the Southern California Gas Company and Southern Counties Gas Company of California. See also *Incorporators of Service Gas Company* v. *Public Service Commission*, 126 Pa. Super. 381, 190 Atl. 653.

wise be served, or to do so at lower unit costs than would otherwise be required. Another pattern, fostered by the Commission since it tends to extend the deliverability life of particular reserves, and lacks the undesirability of consumption of gas under boilers, is the storage of natural gas near centers of consumption. Congress clearly entrusted the Commission with discretion to consider these patterns and their alternatives, and to act on certificate applications in accord with such basic policies.[33]

Indeed, except for erasing the pre-1942 limitation of Commission power to extensions into areas already served, the 1938 Act itself, read against this legislative history, was a sufficient grant of power to permit the Commission to consider the various factors proscribed by the court below. The 1942 amendments completely eliminated any doubt on this score. They broadened the Commission's jurisdiction over the construction and extension of pipeline facilities and empowered the Commission to consider in this connection the use of gas and competitive fuels, and competitive methods of transportation. This meaning of the Act and its history has been fully confirmed by this Court (*supra*, pp. 38–39).

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[33] At the hearings, no adverse reaction met Commissioner Manly's statement that "this amendment will * * * have the effect of promoting the development of the natural-gas industry along lines which will be consistent with the public interest" (Hearings, *supra*, p. 6), nor with his consistent assertions that the original Act gave the Commission full power to act in the public interest, but limited to the area of competition between natural gas companies (*id.*, pp. 6, 7, 8, 9, 10, 11).

2. As we have noted, the court of appeals treated the various factors considered by the Commission as though they were all of a piece—and equated them all with "conservation", which it held had been placed beyond Commission power by the legislative history.[34] Actually, the Commission did not consider the end-use issue as controlling its decision in this case; in its order denying rehearing (21 F.P.C. 399, 401) it said (*supra*, p. 9):

> Contrary to applicants' contentions, we do not view the proposed end use of the gas involved in this case as of decisive importance. In accordance with the *National Coal Ass'n* case, it is but one factor, and that not of determinative importance, which we consider in the exercise of our judgment on all the facts.

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[34] The court of appeals relies on Commission statements in which the court saw "the Commission's own concession" of a lack of power to consider end-use (R. 315). But the question of power can only be resolved by examination of the Act and its history, which reflect the power Congress intended to give the Commission. In any event, we think it clear that in its decisions, as well as in its non-decisional statements made prior and subsequent to passage of the 1942 amendments to the Natural Gas Act, the Commission has never conceded that it has *no* power to deal with conservation, but merely that it did not have the full, specific and comprehensive power over conservation and allocation of gas which it has recently sought from Congress. This understanding is explicit even in the portions of the reports of 1940 and 1944 quoted by the court below. Note the implications of "treat fully" (line 4, footnote 20); "broadened" (second from last line, footnote 20); "comprehensive powers" and "specific powers" (second and seventh lines, last paragraph, footnote 24) (R. 315–316).

See also, for a detailed refutation of the claim that the Commission has conceded that it has no conservation powers, the Brief for National Coal Association, et al., No. 46, at pp. 20–24.

The Commission's view that the other factors it considered stand on their own footing and are not coextensive with conservation is clearly correct.[35] This Court has noted that, depending on the circumstances, any one factor, such as price, can become "a consideration of prime importance," *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391, but cautioned that "all factors bearing on the public interest" *must* be evaluated.

[35] Broadly speaking, any grant or denial of a certificate on *any* basis will have *some* effect on conservation to the extent that it either fosters the production of gas, or fosters leaving it in the ground. In this sense, the approval of rates by the Commission, and indeed the setting of unregulated prices by producers, have an effect on conservation. Once the gas has been produced, conservation becomes a concern of the use to which the gas is put. Gas is then conserved, or not wasted, to the extent that it is spent on socially desirable objects such as immediate superior use, or storage for such ultimate use. See *infra*, pp. 58–60. Conservation policies can thus be brought to bear on every stage of the processing of natural gas from production, through tranportation, storage, distribution, and consumption. Similarly, the Congressional concern with natural gas prices can be an influence at any stage of the processing of gas. These factors and others become relevant to a particular stage of processing only in terms of the circumstances of concrete proposals placed before the Commission. All the factors are interrelated, and they mirror the complexities of an enormous industry. But these complex relationships provide no warrant for fusing them all under the name of any one of them, as the court of appeals attempted to do.

III

THE ACCEPTED INTERPRETATION OF THE "PRESENT OR FUTURE PUBLIC CONVENIENCE AND NECESSITY" STANDARD LIKEWISE EMPOWERS THE COMMISSION TO CONSIDER END-USE AND COMPARABLE FACTORS

This Court has settled beyond doubt the function and meaning of the public convenience and necessity standard used by Congress in the Natural Gas Act and in other legislation establishing federal regulatory commissions.[36] The language of such standards is broad by design.[37] The interpretive function of a commission under them is (*United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241):

> * * * not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment *and to*

[36] In adopting in 1938, and more broadly in 1942, the standard which it had already employed in other federal statutes dating from 1920, Congress must be presumed to have adopted the construction placed on that term of art during some 20-odd years of federal regulation. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Ryan*, 284 U.S. 167, 175; *Armstrong Paint & Varnish Works* v. *Nu-enamel Corp.*, 305 U.S. 315, 332; *United States* v. *C.I.O.*, 335 U.S. 106, 112–113. See also *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285.

[37] As one Congressman put it, "the applicant, in preparing its application would be counted on to take care of its own interests, whereas the public, not having set forth any terms or conditions, might need some protection that the Commission could best give." Hearings, *supra*, p. 24. As the Court put it in *Detroit Navigation*, "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority" (326 U.S. at 241).

determine from its analysis of the total situation on which side of the controversy the public interest lies * * *. [Emphasis added.]

Under this standard, the Federal Power Commission is authorized to take account of *all* factors bearing on the problem before it.

A. The court below, in its insistence that the Commission could properly consider solely the "conventional requirements" for granting or denying a certificate, would permit consideration, not of the "total situation", but merely of those narrow requirements which relate to the particular applicant's (Transco, in this case) ability to perform the proposed service. These limited factors—of technical and economic feasibility of the proposal, adequacy of a gas supply to the applicant, existence of a market for the gas, and the rates to be charged for its transportation—essentially measure little more than whether the proposal is fair to Transco, its investors, and Con Edison. While the stability of the venture in these terms is important to the public interest, it certainly does not exhaust that interest. And this Court has clearly held that a "* * * Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license", or that "technical and engineering" requirements have been satisfied. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216, 217. Actually, the Commission's acceptance of the showing of "conventional requirements" has little to do with the public convenience and necessity standard. It is more directly responsive to the statutory requirement that the

applicant be "able and willing properly to do the acts and to perform the service proposed." *Kansas Pipe Line & Gas Company and North Dakota Consumers Gas Company*, 2 F.P.C. 29, 57 (1939).

But conceding that the Third Circuit's "conventional factors" fall within the public convenience and necessity standard, there is no reason to accept the lower court's freezing of the content of the standard to include only the conventional requirements which were "experience-built" in the earliest days of the Gas Act. This Court has related the public interest standard to "living problems" and "developing problems" of an industry. *National Broadcasting Company* v. *United States*, 319 U.S. 190, 216, 219. The obvious advantage of such broad criteria lies in their capacity to absorb experience, and to keep pace with the times. Freezing the standard would render the Commission incapable of exercising its powers in keeping with changing public needs, and would limit its function to rubber-stamping the economically feasible proposals of certificate applicants.

As the Court has pointed out, the need to examine *all* factors arises from a matter of legislative necessity—the practical impossibility of Congress itself making all of the decisions in all of the areas requiring regulation. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65:[38]

[38] The *Parker* case involves Section 207(a) of the Motor Carrier Act, 49 U.S.C. 307(a), from which Section 7(e) of the Natural Gas Act was derived. See Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, Report of Federal Power Commission, 77th Cong., 1st sess., p. 82; *id.* at pp. 5, 20; H. Rept. No. 1290, 77th Cong., 1st sess., p. 2.

> Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. * * * The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public convenience and necessity. Cf. *Powell* v. *United States*, 300 U.S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * * (See also *Gateway Transportation Co.* v. *United States*, 173 F. Supp. 822, W.D. Wisc.)

The normal involvement of a regulatory commission with "an infinite variety of circumstances" entrusted to its decision makes it necessary for it to consider all of the factors that a legislature would examine if it were to decide on a proposed course of action. The agency's clear duty is to do so in the light of the policy objectives which the legislature has determined are relevant and material to the subject matter entrusted to the agency. For only so can the grant of power become a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. "In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive

powers,"[39]—and the courts have made this clear. Consistent judicial interpretation of the public convenience and necessity standard leaves no room for doubt that it permits analysis of the "total situation" in determining both present and future needs,[40] and that it is the affirmative duty of the agency not to blind itself to any relevant consideration. This was most recently emphasized for the Natural Gas Act by the Court's statement in *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 391, that "Section 7(e) requires the Commission to evaluate *all* factors bearing on the public interest" (emphasis added).

B. This general principle has already been specifically applied by the Court to this Commission and to the Gas Act, in a situation in which it was claimed, as

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[39] *National Broadcasting Co.* v. *United States*, 319 U.S. 190 219.

[40] *United States* v. *Detroit Navigation Co*, 326 U.S. 236, 241: "Forecasts as to the future are necessary to the decision • • •. It may be that the public interest requires that future • • • needs be assured rather than left uncertain. The Commission has the discretion so to decide • • •."

City of Pittsburgh v. *Federal Power Commission*, 237 F. 2d 741, 752 (C.A.D.C.): "The public convenience and necessity for which regulatory agencies issue certificates are the convenience and necessity of the future. The needs of yesterday require no fulfillment if they be not the needs of tomorrow. They may require recompense, but they need no regulation. Every new bus route, new airplane service, new radio station, new stock issue, new pipe line, new power project, and so on, seeks its permissive certificate upon the basis of future possibilities. • • • So the function of the agencies to which Congress has delegated these responsibilities is to examine the relevant past and present and then to exercise a rational judgment upon that data to ascertain the public convenience and necessity in the reasonably foreseeable future."

here, that the Commission had considered an area in which it could not directly regulate. In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 602–603, 604, a rate case, the contention had been raised, on the assumption that the statute's terms precluded any Commission control over production and gathering, that it was improper for the Commission to include production facilities in a natural gas company's rate base, and improper to determine the expenses incident to such facilities for the purpose of determining the reasonableness of the company's rates. This Court rejected that contention, concluding that the Commission was not prevented from taking these matters into account.[41] Similarly, it should be able to take into account, in issuing or denying a certificate, all the economic realities peculiar to the natural gas industry which bear on the public interest, including the factors it considered here.

The same specific application of the general "public convenience and necessity" principle has been made in other areas of federal regulation. For example, while the Interstate Commerce Commission had no direct jurisdiction over the terms of employment of railroad employees, this Court rejected that Commission's determination that it lacked power, under its public convenience and necessity standard, to consider the protection of such employees in an abandonment proceed-

[41] See also *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 646: "The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction. * * *"

ing. *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U.S. 373.[42] See also, *United States* v. *Lowden*, 308 U.S. 225. Reading the standard as having a scope consistent with the broad purpose of the Transportation Act of 1920 to provide the public with an efficient and nationally integrated railroad system, the Court refused to limit the "public" convenience to "the immediate locality and population served by the trackage to be abandoned." There was nation-wide public interest in "the stability of the labor supply available to the railroads" (315 U.S. at 377). Obviously, such stability was no longer of concern to the to-be-abandoned trackage and its managers, but had to be accounted for because of its impact on existing regulated facilities. See also, under the Motor Carrier Act (49 U.S.C. 207(a)), *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60; *American Trucking Associations* v. *United States*, 326 U.S. 77; and *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83.

An equally broad construction has been given the general standard of "public interest, convenience, and necessity" which controls the grant of broadcasting licenses under the Communications Act (47 U.S.C. 309), particular emphasis being placed, as it should be here, on the public interest in the competition for and the use of the regulated resource. *National Broad-*

[42] The *Labor Executives* doctrine has been applied in a transfer of certificate proceeding under the similar standards of Sections 401(d) and (i) of the Civil Aeronautics Act (49 U.S.C. 481(d), (i). *Western Air Lines* v. *Civil Aeronautics Board*, 194 F. 2d 211 (C.A. 9).

casting Co. v. *United States*, 319 U.S. 190; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475–476; *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F. 2d 440, 443–444 (C.A.D.C.).

Under this standard, in spite of Congress' explicit prohibition against Commission power to censor radio communication or interfere with the right of free speech in radio communication (Section 326, Communications Act, 47 U.S.C. 326), the courts have approved the Federal Communications Commission's consideration of the content of station programming as an ingredient in determining whether to grant a broadcasting license under the Act (47 U.S.C. 307). See *Johnston Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 351 (C.A.D.C.); *Plains Radio Broadcasting Co.* v. *F.C.C.*, 175 F. 2d 359 (C.A.D.C.); *Trinity Methodist Church, South* v. *Federal Radio Comm.*, 62 F. 2d 850 (C.A.D.C.), certiorari denied, 284 U.S. 685, 288 U.S. 599; *KFKB Broadcasting Ass'n* v. *Federal Radio Comm.*, 47 F. 2d 670 (C.A.D.C.). One case was remanded to that Commission precisely because it had, among other things, failed properly to consider the proposed programming of a station. *W. S. Butterfield Theaters* v. *Federal Communications Commission*, 237 F. 2d 552 (C.A.D.C.). The reach of this extra-jurisdictional consideration by the Federal Communications Commission, in connection with a certificate application within its jurisdiction, is perhaps farthest developed in *Wrather-Alvarez Broadcasting*,

Inc. v. *Federal Communications Commission*, 248 F. 2d 646, 651 (C.A.D.C.), involving an application to provide network programs to a Mexican broadcaster whose affairs were beyond Commission control. Although the Commission could not directly regulate the programming of either the foreign station or the American, yet it was required to give these matters consideration the better to assess, in terms of the impact of the Mexican broadcasts on American cities, whether granting the application would be in the public interest.

C. Public interest and public convenience and necessity standards are also broad enough to require agency consideration of important congressional policies which permeate other legislation, such as national defense or antitrust policies.

While under the Natural Gas Act the Federal Power Commission has no explicit power in the area of national defense, considerations of national defense were held properly to have been given great weight in the certification of firm natural gas service to replace coal as boiler fuel in the Atomic Energy plant at Oak Ridge. *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462, 466–467 (C.A.D.C.). In that case, national defense considerations overrode the Commission's own policy, discussed *infra*, pp. 59–61, which limits the use of natural gas for boiler fuel. The same court of appeals has held that it is not only within the Commission's *power*, but it is its *duty*, to consider the asserted national defense aspects of a certificate case involving the displacement of oil barges by a natural gas pipeline extension. *City of*

Pittsburgh v. *Federal Power Commission*, 237 F. 2d 741, 754–755 (C.A.D.C.).[43]

The need to consider national antitrust policy is equally clear. Regulatory agencies dealing with competing business giants must often consider the antitrust policies of the Clayton and Sherman Acts, not for the purpose of determining whether those "congressional expression(s) of fundamental national policy"[44] have been violated, but for gauging whether, in the light of antitrust policy, given business activity is in the public interest. In charting the breadth of the "public interest, convenience, or necessity" standard of the Communications Act in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, this Court approved the provision, in regulations of the Federal Communications Commission, for regular Commission consideration of antitrust policy in appropriate cases. And in *United States* v. *Radio Corporation of America*, 358 U.S. 334, 351–352, the Court suggested that

[43] National defense interest in the need for helium gas to further the war effort was recognized in an early case under this Act where this need was presented to the Commission by the United States Bureau of Mines. *The Kansas Power and Light Co.*, 4 F.P.C. 946. The Commission certificated the dedication of natural gas reserves containing helium gas upon the express condition that, if the Government so requested, all of the gas from the field reserves containing helium be made available to the Government's nearby helium plant for extraction of the helium before its transmission for use.

[44] *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 754 (C.A.D.C.). This case regards antitrust policy and assertions of damage from unfair competition, like national defense policy, as matters *requiring*, and not merely *permitting*, Commission consideration.

"the Commission might find that antitrust considerations alone would keep the statutory standard from being met * * * Mansfield Journal Co. v. Federal Communications Commission, * * * 180 F. 2d 28, 33, 34."

In sum, the public convenience and necessity standard of the Natural Gas Act is a general grant of power to protect the gas consumer's interest in adequate service and low prices. It is designed to permit the Commission to guide the development of the industry through the problems envisaged by Congress, so that these objectives may be attained with a view to conserving one of the country's valuable, but exhaustible, natural resources. The Commission is not limited, in passing upon applications for certificates, to the narrow transaction immediately before it but may appropriately take account of the wide range of factors bearing directly and indirectly upon its obligation to protect the public interest.

IV

THE COMMISSION'S EVALUATION OF THE VARIOUS FACTORS WAS REASONABLE AND SHOULD NOT BE OVERTURNED

We think it clear that the discretion exercised in this case by the Commission, and its consideration of the various factors, fit comfortably within the broad confines of power granted by the public convenience and necessity standard of Section 7, interpreted as we urge in Points II and III, *supra,* it should be interpreted. Because the Commission's general statement of its reasons somewhat exceeds the portion

quoted and numbered by the court below (R. 309–310), we set it out in the margin in fuller form."

We shall discuss each of the factors considered by the Commission—end-use of the gas for boiler fuel; the price impact of arrangements such as X–20; their

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"'"This case involves more than merely the conventional requirements of public convenience and necessity. Opposing the grant of the X–20 service are a number of important factors, chiefly policy considerations. In our judgment, countervailing factors suffice to tip the balance against the grant of the authority requested by Transco.

"Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X–20 proposal, we would have no fair or rational basis for denying similar such requests. Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs, even though the bare authorization here sought would not of itself nullify the Leidy Storage project.

"Gas distributing companies may find it to the advantage of their customers to seek their new sources of gas in the field rather than to rely on pipeline suppliers to do so. But there are risks of grave disadvantage as well.

"The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary. But there is at least one other drawback.

"Large purchasers of gas, like Consolidated Edison, can readily compete with pipelines for gas purchases. Here, for example, out of approximately 100 million Mcf that is proposed ultimately to be brought through Transcontinental's lines for Consolidated Edison's use in 1961, almost 44 million Mcf would be under a purchase-contract carriage arrangement. That is the equivalent to a pipeline of about 120,000 Mcf per day capacity at 100% load factors. But the small purchaser may not be as fortunate. He will have to rely on the pipeline supplier. And how long the

effect on the supply of gas available for the smaller ultimate consumer; air pollution—and show that the Commission's appraisal was reasonable and warranted by the particular record before it, its own general expert judgment, and the overriding concern of the Natural Gas Act with the protection of the ultimate consumer. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610; *Atlantic Refining Co.* v. *Public Serv. Comm'n*, 360 U.S. 378,

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pipeline can continue to buy in competition with nonjurisdictional, large volume purchasers, or indeed, how willing it might be to undertake such less desirable service, is at least a question.

"These are all factors that weigh against the grant. They would confound and make more difficult a decision in such a case as this even if the gas were to be used for a demonstrably superior use. But when the purpose for which the sale would be made is something less than desirable, they take on more serious, even controlling, significance." (R. 178a–179a) (footnotes omitted).

In its opinion denying rehearing, the Commission agreed that there could be no preemption of unbuilt capacity, but reaffirmed the sense of its earlier statement, saying (R. 191a):

"[T]he construction and utilization of given capacity for service of the character proposed here would reasonably lessen the likelihood of capacity being constructed for other and future service of a character more in accordance with the requirements of public convenience and necessity."

And in its order denying rehearing, the Commission also summarized the factors which it had considered, as follows (R. 185a):

"Included among these were the effect of stimulating increased purchases of gas in the field by distributing companies in substitution for the present, prevalent types of interstate natural-gas services involving purchases and resales by natural-gas pipeline companies; the effect of pre-empting pipeline capacity which would otherwise be available for more widely beneficial public service; the effect of making it more difficult to meet the requirements of smaller purchasers in the event arrangements of this type become wide-spread; and the effect of increasing the rates for gas, to the detriment of the consumer. We also considered the proposed inferior end use of the gas. * * *"

388; *Sunray Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147.

A. *End-use:*—The Commission's consideration of end-use was prompted in part by the urgings of the coal interests which sought the 1942 amendment precisely because their interests as producers of a competing fuel were unprotected. As we have pointed out, the House report on the bill noted that the door was now opened in certificate cases "to the consideration by the Commission of the effect * * * upon the interests of producers of competing fuels." *Supra*, p. 36. Obviously, adequate consideration of the competition between fuels requires consideration of their use, and an ultimate judgment of which should be used in particular circumstances. The discretion to make this final judgment, which rationally cannot be divorced from the consideration of competition between fuels, is what Congress entrusted to the Commission.[46]

That a certificated pipeline extension will displace the transportation of oil by river barges is the critical competitive fact which gives the barge operators standing to challenge the grant of the certificate,[47]

[46] When in 1947 a proposed bill would have precluded the Commission from denying a certificate because of end-use considerations, Chairman Smith of the Commission testified: "Just how public convenience and necessity could be determined without any consideration of the market and the nature of the demand for gas is hard to see." Hearings before a subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 734, 80th Cong., 1st sess., 60. The bill died in committee.

[47] See *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 746–748 (C.A.D.C.).

and it demonstrates that the use of one means of transportation, rather than another, may constitute the heart of the controversy which must be resolved."[48] Similarly, the displacement of coal by gas, and the resultant displacement of railroad transportation for the coal,[49] show that consideration of this competition and of which fuel shall be used are virtually indistinguishable. As the Court of Appeals for the District of Columbia Circuit has noted, "[t]he corollary of [the Commission's] authority to allow intervention is the duty to explore all pertinent aspects of an intervenor's relationship to the matter under consideration",[50] including the desirability of burning gas under boilers when coal is readily and economically available, or preserving the less abundant premium fuel—gas—for superior uses.[51]

The Commission's concern with end-use considerations in this case is thus reasonable, necessary, and responsive to unusually explicit Congressional direction. Moreover, its decision here is not novel, but follows a traditional and consistent approach to the problem of the desirability of burning gas under boilers, or preserving it for more desirable use. In the course of administering the Gas Act, the Commission has evolved the rebuttable presumption (*Mississippi River Fuel Corp.*, 12 FPC 109, at 112):

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[48] *Ibid.*, pp. 753–754.

[49] *National Coal Ass'n.* v. *Federal Power Commission*, 191 F. 2d 462, 466–467 (C.A.D.C.); *Charleston & W.C. Ry.* v. *Federal Power Commission*, 234 F. 2d 62 (C.A.D.C.).

[50] *National Coal Ass'n.* v. *Federal Power Commission*, 191 F. 2d at 466 (C.A.D.C.).

[51] *Charleston & W.C. Ry.* v. *Federal Power Commission*, 234 F. 2d at 64 (C.A.D.C.).

> * * * that the use of natural gas as boiler fuel is an inferior usage and that, while it is not to be denied in all situations, it should be permitted only on a positive showing that it is required by public convenience and necessity.[52] * * *"

The many cases in which the Commission has adhered to this standard for choosing between the two alterna-

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[52] In labelling "inferior" the use of gas as boiler fuel, the Commission simply recognizes the competition of a more abundant fuel in New York City's fuel supply—coal. The characterization "inferior" coincides with the evaluation of the Federal Trade Commission report on the industry (*supra*, pp. 26–27), and the Commission's own Annual Report of 1940 at p. 79. It was implicitly adopted by this Court (*supra*, pp. 38–39). The court below does not reject the label, and, indeed, grants that Mr. Justice Jackson's dissenting opinion in the *Hope* case (*supra*, 320 U.S. at 629) "goes far in stating reasons of public policy for a strong conservation program by way of husbanding our natural gas resources." (R. 320). That opinion describes the inferiority of boiler fuel use as an essential ingredient of the policy against premature exhaustion of the natural gas resources (320 U.S. at 629, 634–635). Following the exhaustive Natural Gas Investigation (1948, F.P.C. Docket No. G–580), the report of Commissioner Smith and Wimberly urged the industry to limit inferior industrial consumption, even if the result might be a lowering of the system load factor which is improved by the interruptible sale of gas for industrial use during the warmer months (Smith-Wimberly report, pp. 353–354). Commissioners Olds and Draper urged continued and increased use of the certificate jurisdiction to control wasteful end-use of gas, and to develop storage possibilities (Olds-Draper report, pp. 6–13). The lower court's observation that the Commission had ignored the fact that gas used at Waterside would generate steam for ultimate use for space-heating and lighting (R. 323–324) does not detract from the thesis that burning gas under boilers is undesirable (R. 323–324). The focus of this case is not how the steam is used, but which of at least two competing fuels should be used to fire the steam boilers.

tives are collected and discussed in the lower court's opinion, and need not be repeated here (R. 316–318).[33] The court of appeals felt that these cases were lacking in present significance, since it was willing to concede that "if the Commission has authority to regulate end use as part of a conservation plan it certainly has the authority to balance the factors in each individual case as it arises" (R. 318, fn. 33). This makes clear that the court sees the Commission's action in this case as a direct regulation of end-use—as though the Commission were dictating that a particular batch of gas had to be used in a particular way. This proceeding, however, cannot be given that gloss. The Commission is not telling Con Edison how to use its gas, but is telling Transco how not to use *its* facilities because the use *it* intends is not in the public interest. Certainly, if Con Edison discovered gas reserves underneath its Waterside station, the Commission would have no concern with its use of the gas in New York City; but if Con Edison sought to transport the gas through interstate pipelines, it could not complain if the Commission refused its request.

As we have shown in Points II and III, *supra*, the Commission, in applying the public convenience and necessity standard of Section 7, can take account of Con Edison's end-use in passing upon Transco's application. Though it could not command Con Edison to use its gas in a certain way, it could reject

[33] For the history of the Commission's boiler fuel policy, see also the Brief for the National Coal Association, et al., No. 46, at pp. 25–29.

Transco's proposal to transport it— and this is all it did.[84]

B. *Price impact; preemption of gas supply; preemption of pipeline capacity*—In the Commission's view, the most damaging impact of a direct industrial sale of the X–20 type will be upon the general public utility consumer, who is supposed to be the prime beneficiary of the Natural Gas Act. *Atlantic Refining Co.* v. *Public Serv. Com.*, 360 U.S. 378, 388; *Sunray Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 147. To permit the diversion of large amounts of new gas to industrial interstate markets, under this kind of arrangement, will in all probability result ultimately in either less gas, or higher prices (and perhaps less gas at higher prices), to the smaller consumer. In its initial order the Commission declared that the impact of large demand on relatively limited supply "is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear upon the supply" (R. 179a, *supra*, fn. 45, p. 56). "How much more serious is that impact," asks the Commission, "when it is in the form of multiple bidders * * *" (*id.*). In denying rehearing the Commission acknowledged that its judgments on the "probably undesirable consequences for the public and the consumer", particularly respecting future price consequences, were inherently less susceptible of

[84] "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal." *City of Pittsburgh* v. *F.P.C.*, 237 F. 2d 741, 751, fn. 28 (C.A.D.C.).

absolute demonstration than present facts (R. 191a). But it concluded that, in its analysis of the "total situation", its conclusions had "substantial support in fact" (*id.*). These conclusions are plainly reasonable and have support in commonsense, as well as in the structure and history of the natural gas industry.

1. There can be little doubt that approval of the X–20 service, with its invitation to similar schemes, would increase the number of large industrial bidders in the gas fields, and find favor with the gas producers. The X–20 type of arrangement opens to producers the vista of large new interstate sales, free of price supervision (except as to the pipeline company's transportation increment), and in what is a seller's market. The profit incentive for the producer is obvious, and adequently explains the producers' long-held desire to avoid regulation.[35]

The attractiveness of X–20 service to the large industrial consumer also seems clear, for the convenience that a firm gas supply represents to domestic consumers may attain a special fiscal importance in an industrial setting. Without the need for large stockpiles of

[35] In their Report on the Natural Gas Investigation (1948, p. 12), Commissioners Olds and Draper noted "• • • the voluble insistence by representatives of the industry on their desire for a virtually unregulated market for natural gas at virtually unregulated prices • • •."

See also Petition of Phillips Petroleum for Rehearing of Order Denying Petition for Writ of Certiorari in No. 280, October Term, 1953, at pages 5–7; and the suggestion of Con Edison's witness that the reason the producers here insisted that Con Edison consume the gas and not resell it is that they were "allergic" to proceedings before the Commission (R. 108a).

coal,[56] valuable land on which the coal was stored may become available for other use. The labor force devoted to coal movement, as well as the heavy paraphernalia used to move it, would no longer be needed. Special planning for periods of labor unrest in the coal mines or on the railroads, with its requirement for increased stockpiles, would be at an end. Additionally, to industrial users of gas on an interruptible basis, achieving a firm basis of supply would obviate the need for standby facilities to burn either coal or oil during the winter months of increased domestic user demand. And to those potential industrial users of gas to whom interruptability was itself an overriding inconvenience, a firm supply eliminates their major objection.

The gas industry's interest in such transportation schemes as X–20 has forcefully impressed itself upon the Commission both before and after the hearing in this case. The *Houston* proposal authorized in 16 F.P.C. 118 (1956), because of the unique public interest in bringing natural gas to Florida, had included a transportation of directly-purchased boiler fuel.[57] Transco had applied in F.P.C. Docket No. G–12059

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[56] To a lesser extent, these factors are also true of oil storage and its attendant inconvenience.

[57] Earlier, in *Tennessee Gas Transmission Co.*, 12 F.P.C. 311 (1953), the Commission authorized a transportation service of small volumes for export to Canada. The Commission viewed the proposal as a drop in the bucket and felt any dangers it represented could be ignored unless such programs reached larger proportions. (But see Commissioner Smith's dissent, 12 F.P.C. 334. Also compare *Iroquois Gas Corp.*, F.P.C. Opinion No. 279 (mimeo., pp. 19–21, 13 F.P.C. 492, 504–505).

With proliferation of transportation proposals and the aggravated problems of producers' pricing, the Commission is now alert to the considerations it thought outweighed in *Tennessee.*

for a certificate to transport boiler fuel on an interruptible basis for the account of Virginia Electric & Power Company. (The Commission had heard oral argument on that proposal the day before argument herein.) Respondents themselves spread on this record their plans for increasing the X–20 service from 50,000 to 120,000 Mcf per day over the period of two years (*e.g.*, R. 5a, 98a–100a, 142a, 147a, 149a–152a). And there is further evidence in this record of negotiations and interest by other customers in transportation of directly-purchased gas, as well as a suggestion that Transco was encouraging such programs (R. 63a–71a, 145a).

In reporting the decision of the court below, the industry journals, which often enjoy an insight into the plans of gas producers and transporters, were quick to grasp its import and predicted that similar schemes to avoid the regulation of gas prices would probably be forthcoming if the decision were allowed to stand.[58] Even more recently, testimony given in hearings before the Commission reveals that producers and large industrial consumers are engaged in a race to control large gas reserves in new fields for X–20 type arrangements unregulated as to price.[59] Variations on the X–20 theme seem to be approaching the application stage at this time.[60]

[58] See Oil & Gas Journal, November 9, 1959, p. 113; Petroleum Week, November 13, 1959, p. 22.

[59] See Petitioner's Brief in No. 46, p. 40, note 41.

[60] See Oil & Gas Journal, July 25, 1960, p. 131. The New York Herald Tribune, September 19, 1960, p. 28, announces that Tennessee Gas Transmission Co. had signed an agreement with Southern California Edison Co. for a twenty-year transaction involving natural gas for fuel purposes.

2. The inflationary effect of such vast industrial bidding is not difficult to foretell,[41] and some actual results are already known. In the Aneth field in Utah, El Paso Natural Gas Company bought new gas at high prices from various producers, and the parties applied for certificates in F.P.C. Docket Nos. G–12580 and G–13862. The examiner's decision, in the following account, leaves no doubt that the high price paid by the pipeline was strongly influenced by the existence in the field of a single, large, additional bidder which formerly bought gas from that pipeline's customer (23 F.P.C. at 399):

> In substance, the picture presented by the negotiators for the producers was a picture of experienced business men trying to get the best possible deal for the companies they were representing. The same may be said of the witnesses representing El Paso who negotiated these contracts. Such differences in bargaining position as may be said to exist come into being by reason of the sure knowledge of the producers of the tremendous demand for gas in the United States and particularly in California and their awareness of the published critical comment of the Commission concerning the ability of El Paso to meet demands on its system in the light of its reserve situation and the knowledge of the statements of the Commission regarding the advisability of El Paso improv-

[41] Thus, Con Edison's 19¼ cents per Mcf for the Sejita gas involved in this case represented a very high contract price for Texas Railroad Commission District No. 4 (comprising the 15 southern-most counties of Texas and including the gas fields most distant from the great northeastern consuming centers).

ing its reserves. In this connection there was the further fact that the producers had the option of dealing with either El Paso or Transwestern, both of which appeared to be very anxious to acquire this gas *and they further had under consideration* use of the gas in their own refining plants in California and *the possibility of selling the gas to Southern California Edison Company* or selling the gas through a pipeline which they could construct themselves.

It was clear from the testimony that the management of El Paso believed that if it did not agree to meet the price finally reached with the producers, it might not obtain the Aneth supply. All of these factors led El Paso to make the offer which brought the Aneth gas to the price level proposed in this proceeding. [Emphasis added; footnote omitted.]

The Commission's opinion that in a sellers' market more industrial bidders mean upward price pressures is surely a reasonable judgment which faces the realities of the situation in the gas industry.[*] See *Atlantic Refining Co.* v. *Pub. Serv. Comm.*, 360 U.S. 378, 390–391.

[*] Even viewing the X–20 arrangement, in its narrowest context, as the mere channeling of a fixed total demand through two buyers instead of one, the classical economic analysis of supply and demand in a perfect market cannot apply to the business realities in the gas field. See McKie, *The Regulation of Natural Gas* (American Enterprise Association pamphlet, 1957). The fact of federal regulation over some parts of the industry and the impact of varying state regulations makes classical theory inapposite. Even aside from governmentally stimulated departures, the gas market reveals striking divergences from classical patterns. Thus, large quantity sales result in higher unit price than do smaller ones. (Transco's Vice

3. On the other hand, the need of the pipelines for adequate amounts of gas at non-inflationary prices, for ultimate distribution to the ordinary consumer, is of paramount importance. The machinery of the Natural Gas Act has protected the public only because its administration has encouraged producers to sell new gas in interstate commerce, through the pipelines, for resale to ultimate consumers. The prevailing industry pattern of sales by producers to interstate pipelines like Transco, rather than directly to industrial consumers in other states, is an integral part of that protection (which is undisturbed by the relatively limited diversion of gas supply to intrastate markets). Until the decision below, this pattern guaranteed a measure of price protection and adequacy of supply for consumers, since the limits upon the unregulated intrastate market meant that most new gas would have to

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President Stanwood so testified, at R. 62a–63a.) Theory has not yet taken full account of the changing psychology of businessmen nor their reactions such as panic buying under threat of future inflation or shortage. Historical accidents determine where gas is found, its proximity to existing pipelines, and as a result the sum of buyers and sellers whose interests are involved in a particular field. Even the timing of bids and negotiation, and the incidence of litigation, can upset the classical equilibriums. Approval of the X–20 arrangement, as the Commission was aware, could easily trigger significant reactions by businessmen free to "disobey" the "laws" of Adam Smith and David Ricardo. Cf. Zimmermann, *Conservation in the Production of Petroleum* (1957), p. 242: "Some one might argue that in a competitive market a premium fuel such as gas must always sell at a price accurately reflecting its superiority in diverse uses. Theoretically that should be the case under conditions of perfect competition, in the absence of disturbing or counteracting forces. Actually, the natural gas market is full of such imperfections."

be dedicated to interstate sales under regulated prices. If the unregulated market is broadly expanded to include X–20 type arrangements, a very substantial portion of new gas will doubtless be dedicated to direct industrial use, rather than for resale to the ultimate consumer. At the same time, the increase in gas prices resulting from the advent of large industrial purchasers into the gas market will tend to drive up the prices the pipelines will have to pay for the reduced portion of the new gas they will be able to buy.

That the pipelines continue to need new gas to maintain an appropriate relationship between supply and requirements is a common-place, as is the tremendous competitive drive for such new gas. In *El Paso Natural Gas Company*, 22 F.P.C. 900, 950–951, the examiner notes that El Paso has a substantial number of employees who devote their time to acquiring additional reserves, and that one part of this task involves "the obtaining of information concerning gas discoveries in every gas producing area from Louisiana to and including Western Canada, and the exercise of all its ability in an effort to acquire substantial additional quantities of gas." The examiner indicates that "all or nearly all of the large pipeline companies" have to engage in comparable activities and have to bid against each other for gas.[48]

In this scramble for new gas the pipeline company has distinctive problems. It must replace the gas which its existing customers use; out of prudence it must obtain new gas to increase its system's deliver-

[48] The present-day scramble to secure new gas is described by Transco's Vice President Stanwood at R. 58a–62a.

ability life;[44] and it must provide gas for the growth which occurs in currently served areas, and for expansion to and growth within new areas. Transco's own history is a typical vignette in the full tableau. The deliverability life of its gas supply has shrunk over the years.[45] For Transco, turning its energy to transporting Con Edison's gas for a charge may seem to avoid part of the troublesome search for new producer gas. But this solution exacerbates the problem. The natural gas currently offered for sale is quite limited in relation to total demand. That which Con Edison buys and fires under its boilers can never be dedicated to Transco or any other pipeline to facilitate

[44] Gas reserves may be measured in two ways. The cruder approach is to make a geologist's estimate of the total volume of recoverable gas underground, to divide it by the system's annual requirements, and thus to derive a "life index" of the gas supply. The more significant method also takes into account the rate at which gas can be removed from the reservoir, and develops the "deliverability life" of the gas supply, which is the number of years for which the reservoirs dedicated to the pipeline's system can produce enough gas to continue to meet the system's existing requirements. As a pipeline's developed reserves age, the rate of gas flow from the reserves originally dedicated to its service declines. As a result, deliverability life will fall sharply unless new reserves are secured.

[45] While in its earliest certificate cases Transco could show an overall system gas supply of 20 years (see 9 F.P.C. 32, 38), in the instant proceeding it shows only 13 years (Exhibit 13, Sec. 3, p. 4, lines 24, 25, 26, R. 119a). The decline has since continued. In its next succeeding expansion program, which the Commission authorized, Transco showed an 11 year deliverability life. 22 F.P.C. 836, 850 (1959). Most recently, in seeking authority for yet another major expansion, Transco has failed to satisfy the Commission as to the adequacy of its gas supply and its application has been remanded to the examiner for a further showing by Transco. Order issued August 26, 1960, in F. P. C. Docket Nos. G-20107 *et al.* (not yet reported).

the gas industry's regulated development. The Commission's denial of authority to transport such gas will at least tend to result in its being utilized for more urgent service, there being no reason to presume that Con Edison will obtain like volumes of boiler fuel by other means; Transco itself admits that under its tariffs it cannot guarantee firm boiler-fuel deliveries.[66]

4. Moreover, the Commission fears that the expanded X–20 type of service will preempt not only the supply of new gas, but also pipeline capacity which would otherwise be available for smaller consumers (see fn. 45, *supra*, pp. 56–57). Transco replies to this forecast by urging that its depreciation situation "is such that it must keep on expanding facilities" (R. 322, 326)—in other words, that devotion of its pipeline capacity to X–20 service will make no difference in the long run since it will expand ceaselessly. The Court of Appeals, which seems to have accepted Transco's answer, has misapprehended this problem of "preemption".[67]

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[66] Transco did agree to seek a certificate to sell Con Edison equal daily volumes of firm gas if authority for the transportation service were denied (R. 151a). Although that approach would obviate many of the objections to X–20, Transco has not seen fit to make such an application. And in any event, the agreement to do so fails to demonstrate that the Commission would permit such a sale.

[67] Certainly, the gas transported by Transco and fired under Con Edison's boilers can never be dedicated to any public need. In the most literal sense, the gas so consumed is given a preemption. As the court also implicitly recognizes, the pipeline capacity absorbed by the gas in the course of its transportation is also preempted over use for other gas. The disputed and uncertain area regards preemption as to future capacity. For a presentation of the need, in the face of declining deliverabil-

Transco's assurances of continued and unlimited expansion ignore the difference between desire and ability to expand. Many factors limit a pipeline company's ability. Perhaps most crucial of these are its gas supply and the related availability of debt capital. (Even temporary shortages of steel pipe can produce severe restraint.) Furthermore, business self-interest, be its origin managerial or forced by the preferences of lending institutions, does not necessarily follow the course of increasingly supplying general utility needs. If transportation service for industrial users such as Con Edison is more profitable or less risky, and if Transco is free to choose between the two, then it may well bend its expanding efforts into the line of endeavor which private interest indicates.

Pipeline companies have resisted the importunities of small communities, and the Commission has had to order service to them in exercising its certificate powers. See *Texas Eastern Transmission Corp.*, 8 F.P.C. 139. Even Transco originally proposed to serve only the big-city markets. The towns along Transco's route were able to secure service because the Commission was sensitive to their needs and redesigned Transco's rate structure. 9 F.P.C. 32. If, as the Commission fears, transportation arrangements like X–20 attract Transco and other pipelines more than other forms of activity, then the people of such smaller towns will be the sufferers for neither they nor

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ity of reserves, to condition exports of gas so as to avoid preemption of capacity which should be reserved for future use by domestic consumers, see the dissent in *Tennessee Gas Transmission Co.*, 12 F.P.C. 311, 334. See, also, concurring opinion in *Gulf Interstate Gas Co.*, 12 F.P.C. 116, 131.

their local distributors are in a position to bargain with producers for an independent gas supply. Transco has admitted that it would have little interest in transporting small quantities of gas for such people.[48]

5. To the Commission's evaluation of the consequences of an expansion of X-20 arrangements, Transco also offers the "short answer" that Commission powers to regulate rates and scrutinize initial producer prices will protect the general utility consumer. The argument overlooks the basic fact that power to protect depends upon business conditions which lead private initiative to bring gas into the flow of regulated commerce. The Court has observed in *Atlantic Refining Co.* v. *Public Service Commission,* 360 U.S. 378, 394, that where the bulk of all commercial gas moves into the regulated market the only profitable alternative is to sell in that market. If, on the other hand, unregulated markets capable of absorbing the bulk of the new gas should become available to producers, there is surely a danger that they will strive to withhold supplies from interstate utility sales; and a sufficiently large unregulated market may make it impossible to control the price of new sales. The processes for assuring reasonable prices to the public do not occur in a vacuum. They involve the adjustment of powerful economic forces, and depend in large measure on the proportion of the gas industry which can be affected or reached by Commission regulation.

[48] Transco's Vice President Bruns testified that it would be impractical to suggest a transportation service to a small customer (R. 71a).

In this light, the Commission's comment (R. 191a) that X-20 type of service would have "*probably* undesirable consequences for the public and the consumer" (emphasis added) appears as a most conservative forecast.

C. *Air Pollution.*—In attempting to make a positive showing of public need for this particular boiler-fuel use, Con Edison could not claim any shortage of other fuels in New York City, nor even any large price differential between gas and coal. And Transco could not show any significant advantage to its load factor, first, because its load factor is in any event high, and, second, because the X-20 service does nothing to fill system-wide valleys. *Supra,* pp. 5–6. Accordingly, respondents sought to make out a special case through their air pollution argument. The Commission did consider petitioners' contentions as tending to support the grant of a certificate (R. 178a), but concluded, as it explained in denying rehearing (R. 192a), that—

> although air pollution exists in New York City, as it does in many metropolitan areas, the evidence falls short of establishing that burning the volumes of gas here in question in Consolidated Edison's boilers would remedy the air pollution in New York City generally in sufficient measure to offset the detriments of the X-20 service.

Respondents' evidence of the Waterside plant's addition to New York City's air pollution problem left much to be desired. See the Statement, *supra,* pp. 6–8. The burning of natural gas at Waterside would not eliminate, but merely reduce, the burning

of coal there (R. 32a). Much of whatever air pollution problem the generating station presents would remain; and this record as made by respondents is inadequate even to give sharp focus to what that problem is.

No thorough-going analysis of Waterside's impact on the local pollution problem was presented. Respondent's expert read from the general findings (p. 6) of the Interstate Sanitation Commission (New York, New Jersey, Connecticut) *Study of Smoke and Air Pollution in the New York Metropolitan Area* (R. 40a–41a), but he ignored a specific finding, made at the time of a test using the most modern analytical equipment, that "the primary source of air pollution in gaseous form in Manhattan was motor vehicle traffic" (*Ibid.* 9).[*] The same study reflects the host of elements which affect the New York pollution problem, but which are ignored in respondents' presentation, *i.e.*, thousands of apartment and municipal heating furnaces and refuse incinerators, the burning of 200,000 scrapped automobiles annually, the daily discharge into the air of 500,000 gallons of unburned fuels from motor traffic, heavy industry's burning of coal and oil, and windborne contaminants from nearby areas. No figures or studies of the actual damages caused by Waterside emissions were presented, so the

[*] Refined instrumentation for measurement of air pollutants, and for tracing particulate and gaseous pollutants to their source, is in rare use. For a discussion of available and potential sampling and analysis techniques, see Jacobs, *Are Sampling and Analysis Techniques Adequate for Today's Needs?* found in Proceedings, National Conference on Air Pollution, Public Health Service (1958), pp. 94–99.

standard type of analysis of particulates and gaseous emissions which pervades the findings of the experts in this branch of public health study was not available. See Proceedings, National Conference on Air Pollution, Public Health Service (1958), pp. 81–114, 132–174. The presence of unburned hydrocarbons from automobile exhausts and carburetors, and from the handling and distribution of gasoline, proved after much study to be the key to the air pollution control problem in Los Angeles. *Id.* pp. 34–38, 167–170. No similar analysis of the contaminants in the air around Waterside was presented. It is possible that, from a health standpoint, the major boulevards coursing by Waterside and the U.N. building are more dangerous and unpleasant to the community than the emissions from the Waterside stacks, although the latter are of course more obvious. (See R. 133a, 136a, with gasoline filling station sign in right foreground.)

No assessment was made either of the diminution of contamination in the immediate area surrounding Waterside in view of the prevailing winds which bear the smoke, and quantities of dust and ash, out over the East River. Respondents' witness admitted that the fact that the river lies where it does with respect to the Waterside plant and the prevailing wind direction actually rendered inadequate the rudimentary sootfall sampling tests conducted by the city authorities (R. 51a–52a). And there is no indication that tracer tests were run in the surrounding community to determine whether Waterside was the true source of even the less harmful particulate concentrations in

the neighborhood. As a result, no one was able to testify to the percentage of the total Waterside particulate emissions which fell in the vicinity, if indeed the air currents permitted any of them to settle there. While local citizens attribute to Waterside the source of the flyash of which they sometimes complain, it is impossible on this record really to fix the blame anywhere.

The record is similarly inadequate as to the attempts of Con Edison to control Waterside's emissions mechanically. One expert in this field has declared:

> Emission of obnoxious gases and dust from coal-fired electric powerplants depends upon the coal and the design and operation of the equipment. If products of incomplete combustion, such as smoke and organic gases, are emitted, they are the result of faulty design or poor operation. Their amount will vary widely with combustion conditions. We may assume that no significant quantities of these products are emitted from well-designed and properly operated coal-fired electric powerplants.[10]

Although Con Edison insists the job cannot be done, would cost too much, or would require special municipal consent, no definitive proof was offered to support these assertions. No doubt, mechanical precipitators or collectors, specially designed to meet Waterside's specifications, would be costly. But the record contains no detailed evidence which would permit com-

[10] Orning, *Industrial Sources of Air Pollution—Electric Power Plants* (Coal Fuel), found in Proceedings, National Conference on Air Pollution, Public Health Service (1958, p. 155).

parison of the costs of the various pollution abatement alternatives available to Con Edison. The gross cost estimates for specific solutions contained in the record thus have no firm significance.

On this record the presiding examiner was free to conclude, as he did, that petitioners had failed to establish that the proposed service was required for air pollution purposes. His consideration of the evidence concerning the elements of possible injury to health, economic losses (lowering of real estate values, costs of cleaning buildings), the power of the city's health officials to act, the possible shifting of load by Con Edison to other stations, and the practicability of mechanical abatement of the problem, resulted in a general finding of record inadequacy (R. 172a–173a). The Commission's affirmance of his findings was clearly correct. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 492–497.

It is noteworthy that the presiding examiner was prepared to rule, had adequate proof of injury to health, economic loss, etc. been made, that boiler fuel use *under such circumstances* would be "markedly more necessary and valuable than for home space heating, cooking or water heating" and "without doubt" in the public interest (R. 172a–173a). There are no indications in the Commission's opinions in this case that it would not rule the same way if the proof warranted; its boiler fuel policy has not been rigid or unyielding."[11] Air pollution *can* be an issue of decisive

[11] In *El Paso Natural Gas Co.*, 22 F.P.C. 900, 902–903, petition for review pending *sub nom. Southern California Edison Company* v. *Federal Power Commission*, No. 13178 (C.A. 3),

importance if the use of other fuels creates special dangers for a community. But this merely proves the inseparable tie between the competition among fuels, and the appropriateness of the consideration of end-use, as well as of the factors of price and supply. Whether the immediate problem be the demise of an

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the Commission accommodated to the acute smog problem in Los Angeles, and to California's own boiler fuel policy, by conditioning its certificate to permit the distribution and use of gas to be subject to the orders of the state authorities. This was possible because a natural gas company owned the gas, and its distribution to that company's customers could be supervised by the state commission to accord with state policies. But in the X–20 situation, where the gas is owned by the boiler-fuel user, the Federal Power Commission has little opportunity to exercise its conditioning power, and the consuming state commission has no choice. The hopelessness of the position of the consuming state is demonstrated by the opinion of Chairman Maltbie of the New York Public Service Commission in a "boiler-fuel case". *Re Cabot Gas Corporation*, 16 PUR (NS) 443, 445–446 (1936):

"* * * Our natural gas resources ought to be conserved and there is probably no field where the Federal government acting in the interests of the entire country and to protect the welfare of the future could accomplish more than in the natural gas industry. From a conservation viewpoint, I thoroughly agree with Commissioner Burritt, and if I could see how a denial of the present petition would work to this end, I would vote to refuse the application; but will such denial produce the desired results?

"The field from which gas is to be taken by the petitioner is in northern Pennsylvania and southern New York. * * * It is possible for Pennsylvania companies to take all of the gas from this field unless the New York companies remove the gas before the field is exhausted.

* * * * *

"If restriction is imposed on the use of it in New York, it may go to Pennsylvania * * *.

"Thus, the state must either permit inferior use, or lose the gas entirely."

oil barge business,[72] the curtailment of rail transportation,[73] the needs of national defense,[74] or the control of air pollution, the Commission must consider the total situation (including all appropriate factors) in order adequately to adjust local private wants to the national public's needs.

Weighing all of these factors on the scales of the particular record before it and its general judgment, the Commission reasonably concluded that the public convenience and necessity—particularly in the light of the Gas Act's primary concern with the smaller ultimate consumer—would not be furthered by permitting Transco to transport Con Edison's gas under the X–20 arrangement. That reasonable judgment, which is for the Commission to make (see *infra*, pp. 82–83), must be respected by the courts. *E.g., United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 480–482.

Aside from the legal argument that the factors of end-use, price impact, effect on gas supply and pipeline capacity, could not be considered at all by the Commission (which we have answered in Points II and III, *supra*), all that respondents can urge against the Commission's evaluation of these factors is that individual witnesses did not appear to testify to each of the general conclusions reached by the

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[72] *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A.D.C.).

[73] *Charleston & W.C. Ry.* v. *Federal Power Commission*, 234 F. 2d 62 (C.A.D.C.).

[74] *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462 (C.A.D.C.).

Commission. But plainly the Commission relied, and had a right to rely, on its "cumulative experience" with the regulation of the natural gas industry. *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349.[75] Transco's application and the new patterns it suggested called for a regulatory "look into the future and determine * * * what the possibilities are" (Hearings, House Interstate and Foreign Commerce Committee, on H.R. 5249, 77th Cong., 1st Sess. p. 33). Some future events can be estimated with fair precision on the basis of testimony, but with such questions as the relative social utility of burning gas to heat homes, or to anneal metals, or to fire ordinary steam boilers—or the precise price consequences of encouraging unregulated gas purchases in southern Texas—the best answers that experienced judgment can offer are bound to be fraught with uncertainty. See *United Airlines* v. *C.A.B.*, 155 F. 2d 169, 174 (C.A.D.C.). Testimony of gas industry opinion witnesses in this case could not require the Commission to act against its informed judgment that the X–20 type of arrangement bodes harm to the industry and the public which it serves. Nor did the Commission need specific opinion witnesses of its own to support the general judgment it rested on its own "cumulative

[75] "'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."

experience." It had the right to rely on its informed judgment."

V

THE COURT OF APPEALS SHOULD NOT HAVE ORDERED THE COMMISSION TO ISSUE THE CERTIFICATE APPLIED FOR, BUT SHOULD HAVE REMANDED FOR FURTHER CONSIDERATION BY THE COMMISSION

The Court of Appeals also erred in remanding the case to the Commission "with directions to issue the certificate applied for". Under the repeated decisions of this Court, the power of the reviewing court "to affirm, modify, or set aside" a Commission order "in whole or in part", Natural Gas Act, Section 19 (b), 15 U.S.C. 717r(b), does not authorize it to exercise an essentially administrative function. Judicial review ends when an error of law is laid bare; the matter must then be returned to the agency for reconsideration." Assuming that the court's ruling

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" The Commission could of course seek experienced judgment, in the first instance, by the testimony of experts. But it often need not do so, for the Commission itself has a specialist's familiarity with the problems of the industry; and, whether it hears opinion evidence or not, ultimately the Commission must draw upon "an intuition of experience" to decide the appropriate policy. *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U.S. 585, 598. See *Market Street Ry. Co.* v. *Railroad Commission of California*, 324 U.S. 548, 560; *Interstate Power Co.* v. *F.P.C.*, 236 F. 2d 372, 384–386 (C.A. 8), certiorari denied, 352 U.S. 967; *South Carolina Generating Co.* v. *F.P.C.*, 249 F. 2d 755, 764–765, 770 (C.A. 4), certiorari denied, 356 U.S. 912.

" *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 10; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618–619; *Federal*

on the issues of law was correct, it should have permitted the Commission on remand to consider Transco's application anew in the light of the governing rules announced by the reviewing court. In addition to the general principle of remanding overturned agency proceedings of this kind for further administrative consideration, there are in this case special reasons for following the normal course.

A. Transco proposed to enlarge an existing interstate line—not to build a new one; throughout most of the distance Con Edison's gas would be indistinguishably co-mingled with Transco's normal supplies. Without Transco's mainline facilities, the project would have been economically unfeasible. Transco proposed to build laterals to the Normanna and Sejita fields and to achieve an extra capacity of 50,000 Mcf per day by constructing new facilities at certain portions of its main pipeline. The particular facilities required to make X–20 service possible were separately identified at the hearing; they included compressor units and partial loops,[78] as well as the laterals, and would cost some $20,000,000 in all (R.

Trade Commission v. *Morton Salt Co.*, 334 U.S. 37, 55; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.

[78] A "loop" is a second, parallel pipe. Even partial looping increases total line capacity. (The engineering formulae are complex.) Transco's system map, R. 117a, shows virtual completion of the looping of most of its main line. (That map distinguishes facilities proposed in G–13590 but does not explicitly segregate additions which would not be built but for X–20.)

54a–56a). It would cost several times as much to build separate pipeline for 50,000 Mcf a day from Texas to New York; the costs would have to be borne by Con Edison alone and such a project would normally be unthinkable."[9] On the other hand, by utilizing the facilities already in existence and adding slightly to them, X–20 service could economically be undertaken.

The important fact is that, although the Commission denied authority to add the particular facilities designated as necessary for X–20, yet they did not all remain unbuilt. During the pendency of this litigation, the Commission authorized Transco to make another general expansion which included the construction of some facilities formerly proposed to provide X–20 capacity. 22 F.P.C. 836 (1959). As a result, even Transco's showing in this record as to the "conventional factor" of adequacy of the proposed facilities for the X–20 arrangement is now out of date. Indeed, if the Commission followed the judgment below literally, it would fail to authorize sufficient capacity to enable performance of the X–20 service at the present time. The fact is that, in the light of *present* circumstances, the Commission would have to determine a different or amended Transco application, taking account of those new circumstances.

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[9] Insofar as Transco proposed by the X–20 enlargement to exhaust expandability inherent in its existing line it sought, of course, to devote to this service advantages which might otherwise have benefitted a more general, future, service. See *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 750–753 (C.A.D.C.); *Battle Creek Gas Co.* v. *Federal Power Commission*, No. 15,368, C.A.D.C., decided July 14, 1960, and *supra*, pp. 70–71.

B. An even more serious invasion of administrative discretion is involved in the court's disposition of the Commission's concern about the "preemption" of pipeline facilities for X–20 service, discussed *supra*, pp. 71–73. The same considerations we have set forth above reveal the court's error in denying a new opportunity to impose regulatory conditions to protect the public interest in the transportation of the X–20 gas. Had the X–20 service been certificated, it would have proved very difficult for the Commission to alter the arrangement once service had commenced. Con Edison's obligation to pay for the gas in Texas, whether transported or not, would produce a compelling claim upon service in accordance with the terms of the X–20 rate schedule. The court below, instead of forcing the Commission to issue an unconditional certificate to Transco, should at least have permitted a hearing as to the desirability of modifying the proposed rate schedule.[80] In failing to afford the Commission that latitude, the Court of Appeals disregarded, not only the traditional restraints upon judicial review, but also the primary purpose of the statutory certificating process to protect the ultimate consumer. See *supra*, pp. 57, 62.

[80] In this regard, the Commisison has extensive powers under Section 4(b) of the Act to prevent Transco from granting undue preference or advantage to Con Edison. Transco's sales of gas, and implicitly the capacity for such sales, are subject to possible curtailment to meet storage needs, *supra*, p. 4, note 2. The X–20 rate schedule contains no comparable provision, either as to the transportation service or as to the 60-day sale by Transco. The Commission might well have provided for similar restrictions as to X–20 if it had issued a certificate. But since it denied the certificate application outright, the Commission had no reason for discussing the possible need for conditions.

C. Finally, it may well be that Con Edison no longer needs all of the X–20 gas at its Waterside plant. In 1959, without any X–20 service, it burned 10,437,005 Mcf at Waterside (see footnote 10 *supra*, p. 8). Perhaps more gas, already available to Con Edison through ordinary purchases from Transco, can be used for the same purpose. That question should likewise be open on remand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the order of the Commission should be affirmed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
ANTHONY L. MONDELLO,
Attorneys.

JOHN C. MASON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
ROBERT L. RUSSELL,
Assistant General Counsel,
DAVID J. BARDIN,
Attorney,
Federal Power Commission.

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APPENDIX

Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, *et seq.*:

Section 1, 15 U.S.C. 717.

* * * * *

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 7(c), 56 Stat. 83, 15 U.S.C. 717f(c):

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless

there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

Section 7(e), 56 Stat. 84, 15 U.S.C. 717f(e):

> Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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